SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 240

J. NORMAN JONES,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Petition	1
Opinion Below	2
Grounds on which the jurisdiction of this Court is invoked	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	4
Statement of the Case	5
Statement of Facts	8
Reasons for Granting the Writ and Amplifying the Same	42
I	
The Trial Court committed prejudicial error in commenting upon the evidence; in misquoting the evidence and testimony and drawing unwarranted conclusions therefrom; and in expressing its opinion that the question for the jury was whether to believe Petitioner as against all of the other evidence in the case. Moreover, the trial court committed prejudicial error by interjecting itself into the proceedings; questioning witnesses at great length and interfering with the logical order of presentation of the evidence and cross-examination of prosecution witnesses	42

SUBJECT INDEX

Page

II

The Trial Court erred in failing to advise Petitioner's trial counsel that it intended to comment on the evidence during its charge to the jury so that trial counsel might have been personally present during the instruction of the jury and so that he could have objected to the comments by the court and to the instructions..... 61

III

The Trial Court erred in failing to charge the jury that the testimony of an accomplice must be received with caution and weighed with great care. Such error was prejudicial necessitating a reversal of the cause..... 63

IV

The prosecutor suppressed evidence; failed to comply with discovery orders made by the Court, and the trial court erred in permitting the prosecutor, over objection, to use evidence which the prosecutor had suppressed and withheld from inspection of the defense for the purpose of impeaching Petitioner..... 67

SUBJECT INDEX

Page

V

The Government should be precluded from charging the crime of conspiracy where the alleged conspiracy has resulted in substantive crimes which are also charged in the same indictment..... 74

Conclusion..... 77

TABLE OF AUTHORITIES

	Page
Benes v. United States (6th Cir. 1960) 276 F2d 99	54
Billeci v. United States (D.C. Cir. 1960) 184 F2d 394	54
Brady v. Maryland 373 U.S. 83	70,73
Crawford v. United States 212 U.S. 183 29 S. Ct. 260	64
Delli Paoli v. United States (1957) 352 U.S. 232	75
Dinger v. United States (8th Cir. 1928) 28 F2d 548	56
Dunn v. United States (5th Cir. 1963) 318 F2d 89	67
Fletcher v. United States (81 U.S. App. D.C. 1946) 158 F2d 321	67
Freed v. United States (49 App. D.C. 1920) 266 F. 1012	67
Hall v. United States (5th Cir. 1964) 325 F2d 817	67
Kotteakos v. United States (1946) 328 U.S. 750	75
Krulewitch v. United States (1949) 336 U.S. 440	74,75,77
McMillen v. United States (1st Cir. 1967) 386 F2d 29	65

TABLE OF AUTHORITIES

	Page
Miner v. United States (10th Cir. 1932) 57 F2d 506	52,56
On Lee v. United States 343 U.S. 747 72 S. Ct. 867	64
People v. Mahoney 201 Cal. 618 258 P. 607	58
People v. McNeer 8 Cal. App. 2d 676 47 P2d 813	58
People v. Williams 55 Cal. App. 2d 696 131 P2d 851	60
Phelps v. United States (5th Cir. 1958) 252 F2d 49	67
Quercia v. United States (1933) 289 U.S. 466 53 S.Ct. 698	50,51,56
Rossi v. United States (8th Cir. 1925) 9 F2d 362	52, 55
United States v. Borelli (2d Cir. 1964) 336 F2d 376	75
United States v. Consolidated Laundries Corporation (2nd Cir. 1961) 291 F2d 563	70, 73
United States v. Falcone (2nd Cir. 1940) 109 F2d 579	75
United States v. Gollin (3rd Cir. 1948) 166 F3d 123	56
United States v. Johnson (4th Cir. 1964) 337 F2d 180	75

TABLE OF AUTHORITIES

	Page
United States v. Masino (2d Cir. 1960) 275 F2d 129	67
United States v. McCarthy (3rd Cir. 1962) 301 F2d 796	53
United States v. Zborowski (2nd Cir.) 271 F2d 661	70,71
Washington v. Texas (1967) 388 U.S. 14	64
Williams v. Dutton (5th Cir. 1968) 400 F2d 797	72
Williamson v. United States (5th Cir. 1964) 332 F2d 123	64,65,67

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, J. NORMAN JONES, respectfully prays for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit to review its judgment affirming a judgment of the United States District Court for the Central District of California, sentencing petitioner to a maximum period of five years and a minimum period of eighteen months on each count, the sentences to be served concurrently.

OPINION BELOW

Trial in the Federal District Court was by jury.

The opinion of the court below is appended hereto as Appendix "A", and is also found in the Clerk's Record of the Circuit Court. The opinion of the Court below is as yet not reported. The judgment of the court below is appended hereto as Appendiz "B". A copy thereof also appears in the Clerk's Transcript from the Circuit Court.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The date of the judgment sought to be reviewed and the time of its entry is April 7, 1970.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

I

Did the trial court commit prejudicial error in commenting upon the evidence; in misquoting the evidence and testimony and drawing unwarranted conclusions therefor; and in expressing its opinion that the question for the jury was whether to believe Petitioner

as against all of the other evidence in the case. Moreover, did the trial court commit prejudicial error by interjecting itself into the proceedings; questioning witnesses at great length and interfering with the logical order of presentation of the evidence and cross-examination of prosecution witnesses?

II

Did the trial court err in failing to advise Petitioner's trial counsel that it intended to comment on the evidence during its charge to the jury so that trial counsel might have been personally present during the instruction of the jury and so that he could have objected to the comments by the court and to the instructions?

III

Did the trial court err in failing to charge the jury that the testimony of an accomplice must be received with caution and weighed with great care. Such error was prejudicial necessitating a reversal of the cause?

IV

The prosecutor suppressed evidence, failed to comply with discovery orders made by the court, and the trial court erred in permitting the prosecutor, over objection, to use

evidence which the prosecutor had suppressed and withheld from inspection of the defense for the purpose of impeaching Petitioner.

V

The Government should be precluded from charging the crime of conspiracy where the alleged conspiracy has resulted in substantive crimes which are also charged in the same indictment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Involved are the Fifth Amendment to the United States Constitution and 18 U.S.C. 371, 1341, 1343.

STATEMENT OF THE CASE

On May 25th, 1967, the Federal Grand Jury for the Central District of California, returned a Nine Count Indictment against Petitioner, J. NORMAN JONES (hereinafter referred to as "Jones"), EDWARD TEMPLE (hereinafter referred to as "Temple"), ROBERT ERICKSON (hereinafter referred to as "Erickson"), and MARION AUGUSTYN (hereinafter referred to as "Augustyn").

Count One of the Indictment alleged a violation of Section 371 of Title 18, United States Code and charged that commencing on August 1, 1966, each of these named defendants conspired together with other unknown conspirators to commit offenses against the United States, to wit: Violations of Title 18, United States Code, Sections 1341 and 1343. Count One further charged the commission of five overt acts in furtherance of the alleged conspiracy (C.T. 1-3). 1/

Counts Two, Three, Four, Five and Six, each charged Temple with a violation of Section 1341 of Title 18, United States Code commencing on August 1, 1966, and charged Jones and Erickson did aid, abet, counsel, command, induce and procure each of the said offenses in violation of Section 2, of Title 18, United States Code. (C.T. 4-11).

Counts Seven, Eight, and Nine of the Indictment each charged Temple with a violation

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1/ C.T. when used hereafter refers to the Clerk's Transcript of Proceedings.

of Section 1343 of Title 18, United States Code, and charged that Augustyn did aid, abet, counsel, command, induce and procure the commission of each of the said offenses in violation of Section II of Title 18, United States Code (C.T. 12-14).

Each of the named Defendants pled not guilty to all counts on June 12, 1964 (C.T. 16). Trial by jury commenced on January 16, 1968, before the Honorable Pierson M. Hall. Erickson moved to change his plea as to Count Two of the Indictment and the plea was accepted by the Court. A jury was impaneled and an opening statement made by the United States Attorney (C.T. 73).

On January 23, 1968, Augustyn moved to withdraw his plea of not guilty to Count VII of the Indictment. The motion was granted and Augustyn entered a plea of guilty to Count VII. Temple moved the Court to withdraw his pleas of not guilty to Counts II and VII of the Indictment. The motion was granted and pleas of guilty were entered by Temple as to Counts Two and Seven and were accepted by the Court (C.T. 74).

At the commencement of proceedings on January 24th, 1968, the Court told the jury that Augustyn was not being tried because he had pled guilty to one count; that Erickson was not being tried because he had pled guilty to one count and that Temple was not on trial because he had pled guilty to two counts and that the case would proceed against Appellant only. (R.T. 57).[2/]

Following conclusion of the prosecution's

2/ R.T. refers to the Reporter's Transcript of Proceedings

case Petitioner moved for a Judgment of Acquittal. The motion was denied. (R.T. 1339).

The jury found Petitioner guilty of Counts I through VI of the Indictment (C.T. 92-94). Petitioner was sentenced to the custody of the Attorney General for a maximum period of five years and a minimum period of eighteen months on each count, the sentences to be served concurrently (C.T. 94,95).

A timely Notice of Appeal was filed on March 28, 1968, (C.T. 98) and this appeal followed.

On April 7, 1970, the United States Court of Appeals for the Ninth Circuit affirmed the judgment.

STATEMENT OF FACTS

Erickson entered a plea of guilty to Count II of the Indictment on January 16, 1968. Following Erickson's change of plea, a jury was impaneled and the United States Attorney made her opening statement. Trial was continued until January 23, 1968 (C.T. 73).

On January 23, 1968, Augustyn entered a plea of guilty to Count VII of the Indictment and Temple entered a plea of guilty to Counts II and VII of the Indictment. Petitioner remained as the only defendant to be tried and trial was continued to January 24, 1968 (C.T. 74).

The trial here was a lengthy one. The Reporter's Transcript of proceedings consists of 2,584 pages. A huge number of documents and exhibits were received in evidence. While the jury was deliberating the trial court characterized the case thusly (R.T. 2575):

> "...this is a complicated indictment, it is a complicated case..."

The limitations imposed by Rule 28 of the Federal Rules of Appellate Procedure which govern the length of this brief preclude us from summarizing the testimony of the witnesses and the evidence to any great length. We shall attempt to briefly set forth and summarize the most pertinent portions of the testimony and evidence and to develop the chronology of events that led to the indictment of Petitioner.

We shall additionally discuss certain pertinent facts, evidence and testimony in our Argument insofar as a review of Reporter's Transcript of Proceedings is necessary to a proper determination of the various grounds urged on this appeal. The facts were basically as follows:

Petitioner was at all times pertinent the President of the Hollywood National Bank (hereinafter referred to as "H.N. Bank") located in Los Angeles, California. Edward Temple was an ex-convict who had served prison terms for a violation of the Mann Act, for larceny and "a con game". Temple was engaged in the "business" of representing himself as being able to obtain large loans from union and pension fund sources. He obtained "standby fees" from persons desirous of obtaining loans, although he never actually obtained any loans or had any contacts to secure the same. A number of his victims had reported Temple to the police and District Attorney's Office. He repaid some of these persons in "dribbles" and did not pay others back at all (R.T. 716-739).

Temple was introduced to the bank by a Director, John Simon, and on August 10, 1965, opened a checking account in the name of "Teepee Inc.". On September 30, 1965, this account was superseded by an account in the name of "Nickward, Inc." which, as did the "Teepee" account, required the signatures of both Temple as President of the Corporation and a Mr. Prisant as Secretary

for the purpose of issuing checks or making withdrawals (R.T. 127-163). After opening these accounts Temple had occasion to meet Petitioner. (R.T. 716-725).

Early in February of 1966, Temple secured Sixty or Seventy Thousand Dollars in worthless checks payable to his order by "Cal-l-Exploration" which he cashed at the Hollywood National Bank. Temple replaced them with other checks written on accounts of different companies which were also dishonored. Petitioner called Temple to his office; was quite upset with him; yelled and screamed at him and accused him of cashing checks which had been dishonored. Petitioner told Temple that if Temple was going to conduct his business in that manner he should have a checking account that would give him some lattitude instead of the day by day pressure and explained the funotion of "counter checks" to Temple. From this conversation, Temple concluded that the operation of a check kiting scheme might be more easily facilitated by his opening another account in an out of state bank and by the use of counter checks back and forth between the banks, since a counter check took several days longer to clear than did the regular printed checks issued to customers by a bank (R.T. 517-528).

Months later Temple happened to be in Minneapolis, Minnesota. He recalled the conversation that he had had with Petitioner in

February and opened an account at the Chicago Lake State Bank (hereinafter referred to as "C.L.S. Bank") in Minneapolis on June 10, 1966. Later that year Temple was to engage in a large check kiting operation whereby millions of dollars in checks were passed back and forth between the C.L.S. Bank and the H.N. Bank. Petitioner did not suggest that Temple open the out of state account or tell him what to do. As Temple responded to a question by the court as to whether or not Petitioner had suggested an out of state bank (R.T. 526):

> "No. But what I am trying to say is that he wasn't suggesting to me to do this here, but the knowledge that he gave me of what to do enabled me in a lot of ways to do what is done right here right now."

Jack R. Roberts, who was the President of Pacific Ocean Park, had previously owed money to the H.N. Bank and had become acquainted with Petitioner in the course of requesting extensions of time to pay the obligation. Roberts was desirous of securing a Five and One Half Million Dollar loan and requested the assistance of Petitioner sho advised him that he would introduce him to Temple who was in the business of making such loans with the proviso that Pacific Ocean Park do its banking business with H.N. Bank. After advising Roberts to protect himself in his dealings with Temple, Petitioner introduced

Roberts to Temple who requested an advance fee of $25,000.00 to secure the loan for Pacific Ocean Park. Roberts did not have this sum available and Temple thereupon offered to obtain a $25,000.00 loan for Roberts, the proceeds of which would be given to Temple as the "standby fee". On February 2, 1966, Roberts in the presence of Petitioner gave Temple a personal check in the sum of $20,000.00 which was not to be negotiated until the loan was consummated. Temple cashed the check at the H.N. Bank with the approval of Petitioner.

On February 4, 1966, Roberts and the Treasurer of Pacific Ocean Park executed a $25,000.00 note to the H.N. Bank. At the request of Roberts, Petitioner instructed his secretary to prepare a second note evidencing a loan of $25,000.00 by Roberts to Temple, it being understood that Temple was to be obligated to repay the loan made by the bank to Pacific Ocean Park. Roberts proceeded to his bank, accompanied by Temple, and deposited $20,000.00 to his account in order that the check which he had previously given to Temple would clear. He received $5,000.00 in cash which he gave to Temple (R.T. 869-889 and 476-592).

Temple testified that he took the Five Thousand Dollars in cash which had been given to him by Roberts on this occasion and gave it to Petitioner. Temple did not receive any note, document, or receipt and did not expect one. The

Court questioned Temple with respect to this transaction and the following colloquy occurred (R.T. 592-593):

"The Court: Did you say anything to him (Petitioner) when you gave it to him?

The Witness: Excuse me, Your Honor?

The Court: Did you say anything to him when you gave him the $5,000?

The Witness: Whatever I said probably went without question or didn't have any meaning.

By Mrs. Dunne: Q. In relation to when you got the $5,000 from Mr. Roberts in cash, do you have any recollection as to how soon thereafter you gave the $5,000 to Mr. Jones?

A. It was the same day that I went back to the bank.

Q. All that same day as the loan came into existence?

A. Yes, Mam.

The Court: Did you get any consideration for the $5,000 or was this a present or what?

The witness: It was a consideration for what I had been getting prior to that, which was a lot of consideration.

The Court: Because of his handling of your overdrafts?

The Witness: We didn't have any open discussion about that, Your Honor.

The Court: You never had any open discussion?

The Witness: No, there was never any discussion about, you give me this and I will do that, it wasn't that kind of a thing.

The Court: But you gave him the $5,000?

The Witness: I was cashing the checks at the bank."

Temple never procured a loan for Roberts or received any monies from him. Roberts spoke with Petitioner several dozen times with respect to Temple's progress in paying off the loan which the bank had made to Pacific Ocean Park. On one occasion Petitioner advised Roberts that Temple had paid the loan down to the sum of $19,000.00 and requested that Roberts sign a renewal note in this amount. At a later date Petitioner told Roberts that Temple had paid the balance down to the sum of $8,500.00 and requested that Roberts sign a renewal note in that amount. Neither Roberts nor Pacific Ocean Park was ever required to make any payments to the H.N. Bank (R.T. 873-889).

Early in March of 1966, Sergeant Carpenter of the Los Angeles Police Department Intelligence Division received information that

Temple had secured a sizeable loan with the H.N. Bank. Carpenter called Petitioner who verified that the Bank had made an unsecured loan in the sum of $25,000 to Temple. On March 11, 1966, Carpenter called Petitioner who agreed to meet with him on March 15, 1966. On the day prior to this meeting Carpenter advised Petitioner that Temple had two arrests for larceny. Petitioner told Carpenter that he had spoken with Temple and told Temple that the bank desired to recall the loan or not let it go beyond the maturity date. Petitioner told Carpenter that he had been advised by the Loan Officer who had made the loan to Temple that Temple had been in trouble many times with the police (R.T. 1223-1228).

Carpenter and Petitioner met at the bank on March 15, 1966, at which time Petitioner repeated his conversation with Temple relative to recalling the loan. Petitioner also told Carpenter that while it was unusual to make an unsecured loan of that size one of his bank officers had recommended Mr. Prisant who had in turn introduced him to Temple and that Temple and Prisant had furnished a financial statement showing holdings of close to one million dollars in support of their application for the loan. Petitioner told Carpenter that on that basis he had made a 30 day unsecured loan in the sum of $25,000; that he had Temple "under investigation" and would furnish Carpenter with copies of the

"report and financial statement". Carpenter never received this information and had no further contact with Petitioner (R.T. 1223-1233).

Sometime after Temple opened the checking account at the C.L.S. Bank in Minneapolis on June 10, 1966, he told Petitioner of the fact that the account had been opened but did not tell him that it was opened with a deposit of only $200. Temple wrote some checks at the H .N. Bank on the C.L.S. Bank account and explained to Petitioner that the checks were good; that he had spoken with Mr. Erickson, a Vice President of C.L.S. Bank, and that Petitioner could call Mr. Erickson if he desired to do so. Petitioner replied that this was not necessary (R.T. 541-544).

Temple purchased a 1966 Cadillac automobile from Erickson for $5,700 cash. He let Prisant use the vehicle for a month or so. Temple and Petitioner then agreed that Petitioner would purchase the 1966 Cadillac from Temple in return for Appellant's 1964 Cadillac and $1,000. Temple brought Petitioner some registration or title papers from Erickson which Petitioner returned to Erickson along with a letter dated December 20, 1966, which said in part:

> "Enclosed is a completed registration form that Eddie dropped off at the bank for me to sign. I have executed it and at his instruction I am returning it to you."

When the situation "became involved" in March of 1967 Temple and Petitioner agreed that Temple would return the 1964 Cadillac to Petitioner and that the 1966 Cadillac would be returned by Petitioner to Temple. The exchange took place; Temple procured Petitioner's signature on the registration documents and sold the automobile to Budget Lease-a-Car. Temple did not return the $1,000 which had been paid to him by Petitioner as a part of the trade (R.T. 608-636; 361-373; 702-710).

Petitioner was in Hawaii from July 15th through July 30, 1966, during which time Temple drew four checks payable to cash on his account at the C.L.S. Bank (Exhibits 31-A, B, C, and D). Temple cashed them at the H.N. Bank after they were approved for immediate credit and initialed by Augustyn (R.T. 1422-1425; 1493-1505). Whenever Temple received immediate credit in the form of cash or a cashier's check in return for a check that he had drawn on another bank the transaction normally took place with Augustyn. When large checks written by Temple bounced it was Petitioner and not Augustyn that got him into the bank and "raised the roof" (R. T. 762-768).

On September 1, 1966, Temple opened a checking account at the Metropolitan Bank in Los Angeles with a deposit of $5,000. He drew a check payable to cash which he negotiated at

H. N. Bank. After Metropolitan Bank refused to honor the check it was returned to H.N. Bank unpaid. Temple picked the check up from Petitioner (R.T. 549-551). On September 7, 1966, checks totaling $57,000 drawn on Temple's account at the Metropolitan Bank reached that bank for payment. Robert L. Hoffman, the Manager of the Metropolitan Bank called and advised Temple that his account was overdrawn. Temple told Hoffman that he would be in with a deposit. Hoffman advised Petitioner of these facts and told Petitioner that the Metropolitan Bank was returning the checks to H.N. Bank unpaid. Petitioner replied, "something to the effect that Mr. Temple was using his money on the weekend, it seemed, and that he would talk to him about it". That day Temple deposited $16,000 in the form of checks to his account at the Metropolitan Bank. That bank then paid a $20,000 check which Temple had written and returned the two checks to H.N. Bank unpaid. On September 12, 1966, Temple drew a $15,000 check on his account at Metropolitan Bank and negotiated it at the H.N. Bank. Hoffman called Petitioner and advised him that Temple's account was being closed and that the $15,000 check was being returned unpaid to H.N. Bank. Petitioner made no comment (R.T. 1151-1166).

Temple testified that shortly after the checks drawn on Metropolitan Bank and totaling $57,000 were negotiated at the Hollywood

National Bank Petitioner called Temple to his desk. Petitioner was "upset" with Temple because the items were being returned and because Temple had not made the proper deposit (R.T. 554-556).

Audie Murphy was an actor who needed $250,000 for a motion picture. A friend introduced him to Temple sho gave him two checks each in the sum of $15,000 drawn on Temple's account at the C.L.S. Bank. After Murphy deposited the checks Temple told him that only one of the checks would clear but that if Murphy would come to H.N. Bank Temple would try to secure a loan for him in the sum of $15,000 to cover the check that would be returned for insufficient funds. On October 3, 1966, Murphy and Temple went to H.N. Bank to discuss "the possibilities of making a loan" with Petitioner. Petitioner advised Murphy that the bank would require a financial statement from him and would also require an up-to-date financial statement from Temple since Temple was to guarantee the loan. Petitioner advised Murphy that the bank would not loan money to persons who did not do business there and Murphy opened a checking account. He received the proceeds of the loan in the form of a Cashier's Check and agreed to furnish Petitioner with certain financial statements and balance sheets at a future date. Outside of the presence of Petitioner, Murphy endorsed the Cashier's Check and handed it to Temple. A day

or so later Murphy submitted a financial statement and balance sheet to the H.N. Bank showing his net worth to be $552,000 (R.T. 904-913; 920-932).

Temple testified that a day or two after receiving the Cashier's Check from Murphy he cashed it at the Continental Bank and gave Petitioner $5,000 in cash(R.T. 636-647). No one else was present when he handed the money to Petitioner. Temple did not say anything to Petitioner when he handed him the money and Petitioner said nothing to Temple when he accepted the $5,000. (R.T. 647-648). When Petitioner later asked Temple to pay the note off Temple did so with checks that he cashed at the H.N. Bank. The note (Exhibit 48) bore the inscription "Paid by Guarantor 12/15/66 Edward Temple" and was initialed by Petitioner (R.T. 650).

Temple testified that in the early part of October of 1966 Petitioner introduced him to a Mr. Carl Long. At the request of Petitioner, Temple gave Long money on two or three occasions; that on one occasion he gave Long $20,000 which was never repaid; on another occasion he gave Long $15,000 at Petitioner's desk; on another occasion he gave Long $5,000 or $10,000 at the Teller's window of the H.N. Bank explaining that although he knew that the money would not be returned to him Petitioner "almost insisted that I gave it or it is going to ruin the relationship, and I would rather lose the $40,000 than

lose the relationship with Mr. Jones". (R.T. 656).

Petitioner testified that Long had been indebted to the H.N. Bank in the sum of $70,000 and that he introduced Long to Temple for the purpose of having Temple obtain a $100,000 loan for Long from the C.L.S. Bank the proceeds of which Long was to use to reduce his obligation to H.N. Bank. Petitioner testified that Long did reduce his loan in the amount of $35,000 with the proceeds of the funds that Long received from Temple. Petitioner spoke with Erickson on several occasions regarding the loan to Long. Erickson told Petitioner that the C.L.S. Bank was in fact going to loan Mr. Long $100,000. During this period of time Long had accompanied Temple to the C.L.S. Bank in Minnesota. Petitioner denied having received any money whatsoever from Temple and further denied having received any monies from any other persons on behalf of Temple (R.T. 2117-2126).

On October 11, 1966, Petitioner purchased a Television Set from Temple which he paid for by a check payable to Temple in the sum of $102.00. A dozen other persons connected with the bank had also purchased television sets from Temple for the same sum (R.T. 1634-1647).

Gordon M. Burwell, was, as was Erickson, a Vice President of the Chicago Lake State Bank. On October 21, 1966, while Erickson was out of town a bank employee approached him with a handful of checks which had been drawn

by Temple on the account at the C.L.S. Bank and negotiated at the H.N. Bank. Burwell told his employee to dishonor the checks and to send them back to their source. A week later a similar group of checks arrived at C.L.S. Bank for payment which, if honored, would have overdrawn Temple's account in a sum of over $100,000. Burwell instructed his employee to dishonor the checks and return them. Burwell testified that Erickson was not a prudent banker and had a bad reputation in banking circles (R.T. 310-430).

Bernard W.Ely was Assistant Manager and Assistant Cashier in charge of transit and clearings for the United California Bank which acted as a clearing agent for the H.N. Bank. Records of the United California Bank showed that H.N. Bank had been advised on numerous occasions by telegram and telephone that checks deposited there by Temple had been dishonored by C.L.S. Bank and the Metropolitan Bank and also that United California Bank had received numerous telephone calls and telegrams from C.L.S. Bank and other banks advising them that checks drawn by Temple were being dishonored. This information had been relayed to H.N. Bank and the dishonored checks returned to them. In early November of 1966, Mr. Ely advised Petitioner that he thought that "perhaps there was a kite going on in the Edward Temple account". (R.T. 1168-1204). Shortly before Christmas of 1966 Ely again called Petitioner to tell him that the kite

was still apparently in effect and that Temple's checks were still being returned. On each of these occasions Petitioner thanked Ely for his interest. On January 10, 1967, Ely advised Petitioner that 17 checks in the sum of $25,000 each negotiated by Temple at H.N. Bank were being returned unpaid by the C.L.S. Bank. Petitioner replied that he had instructed his Auditor to check directly with C.L.S. Bank (R.T. 1204-1208).

On November 22, 1966, Temple drew a check on the Continental Bank payable to cash in the sum of $25,000 and negotiated it at H.N. Bank. When this check was dishonored Petitioner called Temple to his desk and told him that he had an overdraft at the Continental Bank; that Continental Bank wanted their money right then and there and that he, Petitioner, according to Temple "was tired of this day by day pressure because it really got to be quite a thing--". Petitioner told Temple to get the money up to Continental Bank. Temple presented a number of worthless checks which Petitioner approved for immediate credit and obtained Cashier's Checks totaling $60,000 which he took to the Continental Bank. Temple did not tell Petitioner that the checks which he had used to purchase the Cashier's Checks were worthless (R.T. 558-565).

Sometime around the end of October or the beginning of November of 1966 Temple cashed checks in the sum of $250,000 drawn on the C.L.S. Bank at the H.N. Bank. When these checks were

dishonored, Temple testified that he had a conversation with Petitioner who "really got upset with me that day". Temple testified that Petitioner told him (R.T. 573-574):

> "... and that I had better get my business in order, straighten it up and keep it that way, because he had already went through this period with me with all this pressure from Continental Bank, from this bank and that bank in town here; now all these other checks were coming back. So he explained to me that I had better make the proper deposits, to see that whatever deposits in the form that I was making them was made properly so that we wouldn't have all these checks coming back, particularly to Hollywood National."

Temple characterized the conversation with Petitioner as follows (R.T. 574):

> "It was meant, in essence: However you are keeping this account straight, this is the way you had better keep the other one straight. You can't have all these checks coming back, period."

In November and December of 1966

Temple purchased $70,000 of Time Certificates of Deposit and 300 shares of H.N. Bank Stock after Petitioner had allegedly told him that it might be best to do so. Sometime after January 12, 1967, Temple surrendered the Time Certificates of Deposit to Mr. Gould of the Hollywood National Bank in Minneapolis, Minnesota, at which time Gould, Petitioner, Erickson and attorneys for the banks were present and after it had been discovered by both banks that Temple had been kiting checks in large amounts between the two banks (R.T. 684-689).

In the latter part of November and again during the second week of December, 1966, William H. Gregory, a Vice President of the United California Bank, telephoned Petitioner and advised him that checks drawn by Temple on the C.L.S. Bank were being returned for insufficient funds. Gregory told Petitioner that his bank was uncomfortable handling these items as cash items and suggested that they should be recleared or redeposited and handled as direct collections without using the clearinghouse facilities of the United California Bank. On each of these occasions Petitioner assured Gregory that Temple's accounts at the Hollywood National Bank reflected ample funds to cover the return of any items and that there was no reason for concern (R.T. 163-176).

In early December of 1966, Al Brooks,

a Director of H. N. Bank observed a "reviewing sheet" and noticed that Temple's accounts were overdrawn. He asked Petitioner about this and Petitioner replied "it is no problem. It has already been covered by cash". (R.T. 215-245).

On December 17, 1966, Temple cashed two checks in the sum of $25,000 each drawn on C.L.S. Bank at H.N. Bank and caused a transfer of funds by wire in the sum of $50,000 to be made to C.L.S. Bank. The wire bore the initials of Augustyn.

At Christmas of 1966, Temple purchased some sweaters and a christmas card. He placed ten $1,000 bills in the card and packed the card along with the sweaters in a box which he gave to Petitioner as a Christmas present. He also gave presents to Augustyn and other employees of the bank (R.T. 604-607).

On December 28, 1966, Temple caused a $50,000 wire of funds to be sent from the Hollywood National Bank to C.L.S. Bank. He paid for this wire with worthless checks drawn on C.L.S. Bank.

In the ten day period from January 3, 1967, to January 13, 1967, 55 checks totaling some $850,000 drawn on Temple's account at H.N. Bank were deposited by him at C.L.S. Bank. These checks were dishonored by H.N. Bank. In mid-January of 1967, Mr. Gregory again called Petitioner and advised him that a group of checks

drwan by Temple on C.L.S. Bank were being returned. Petitioner replied that he was aware of this fact but that Temple's account contained funds against which the checks could be charged and that steps were being taken to eliminate any additional checks being cleared through United California Bank. Petitioner also told Gregory that he was going to Minneapolis that evening to discuss it with the banker there (R.T. 163-176).

On January 10, 1967, Joseph Gould, a Vice President of H.N. Bank, was advised by a "proof machine" operator that hundreds of thousands of dollars worth of Temple's checks were being returned. Gould asked Petitioner about this and Petitioner said "don't worry about it"; that the bank was returning $450,000 of checks on that date and that Petitioner was also going to return another $450,000 in checks from the day before; that the bank had $1,036,000 in Temple's accounts, was amply covered and that the bank would come out of it with some Ten or Fifteen Thousand Dollars to the good if all of the checks were returned. On this occasion Petitioner called Augustyn to his desk and verified that the balance in the Nickward Account was $1,036,000. On January 11, 1967, Mr. Gould again checked with Petitioner and was told that the bank was protected and that everything was alright (R.T. 1069-1074).

On January 12, 1967, Petitioner

transferred $500,000 by wire to C.L.S. Bank. On that date Directors Gould and Brooks participated in a meeting of the Executive Committee of H. N. Bank at which Petitioner was present. Brooks offered a resolution that the bank cease doing business with Temple. When Petitioner advised the Committee that the bank had $1,036,000 of Temple's money and that the bank was in good shape if all of the checks that had been deposited by Temple were returned to C.L.S. Bank, the motion failed for lack of a second. Brooks also proposed a resolution to the Executive Committee that limits be placed upon the amounts of overdrafts that could be approved by all officers of the bank. There had never been any previous formal policy of the bank with respect to overdrafts and Brook's resolution was discussed for the purpose of setting into motion a definite policy on overdrafts. No action was taken on Mr. Brook's proposal. Petitioner did not tell the Executive Committee that he had wired the sum of $500,000 to C.L.S. Bank. The Board of Directors of the bank met on the evening of January 12, 1967. The minutes of that meeting reflect that Mr. Brooks reported to the Board about the discussion that had taken place earlier in the day with respect to overdrafts at the Executive Committee Meeting. Brooks requested that Temple not be permitted to overdraw his accounts. No action was taken for

lack of a second to this motion. Petitioner similarly did not notify the Board of Directors of the fact that he had wired $500,000 to C.L.S. Bank (R.T. 1069-1075; 215-245; 260-306).

On January 13, 1967, Petitioner told Gould that he had wired $500,000 to C.L.S. Bank "to stop the kite on that end, and this would end it all" and showed Gould a number of telegrams which Petitioner stated guaranteed that only $450,000 in checks would be dishonored by the C.L.S. Bank in return for the wire of $500,000 (R.T. 1075-1088).

Gould testified that H.N. Bank statements of the Nickward Account showed a closing balance of $1,153,000 on January 11, 1967, and that on January 12, 1967, the statement indicated a balance of $432,000 in the account. Gould subsequently went to Minnesota where meetings were held with officials and attorneys of the banks. The C.L.S. Bank did not honor its agreement to return only $450,000 of Temple's checks and Gould was advised by his attorneys that the telegram did not constitute a binding contract. Gould felt that he was being"stalled"by officials of C.L.S. Bank and that he was getting nowhere in his negotiations (R.T. 1090-1125).

Temple testified to the events of the day on which his check kiting scheme came to an end. Upon arriving at the bank in response

to a call from Petitioner he was met by Augustyn who told him that there were a lot of checks coming back that he was to call Erickson immediately and find out what Erickson was doing sending back a whole batch of checks. Erickson told Temple that he was dishonoring checks in the sum of $425,000 and returning them unpaid to the Hollywood National Bank. During this conversation Petitioner told Temple "tell him not to do this, that we are wiring some money and are trying to find out how many checks they had coming that way still". And Augustyn was looking at Temple's deposits for the previous few days to determine how much to wire the Chicago Lake State Bank. He continued: "they finally decided that they would send half a million dollars from my account here, which at that time I think had over a million dollars in it". Neither Augustyn nor Petitioner wanted to sign the wire for that amount of money but Temple told Petitioner to go ahead and sign it and send it (R.T. 690-691 et seq) Temple could not recall whether he had seen the wire (Exhibit 13) from the C.L.S. Bank which was received by the Hollywood National Bank and which read:

> "Upon your wiring $500,000, we hereby guarantee that only $425,000 will be returned on Nickward, corporation".

On January 12, 1967, the balance shown on the Nickward Account was $1,015,354.02. Temple testified that after Petitioner sent the wire of funds he gave Temple permission to cash a $7,000 check (Exhibit 15); (R.T. 694-695; 698-699); that he (Temple) had previously left a large number of checks containing his signature only and drawn on the C.L.S. Bank with Augustyn and on a few occasions had left such blank checks with Petitioner. He had instructed Petitioner to use these checks to make a deposit to his account for the amounts of any overdrafts if he were out of town or if anything came up in his absence (R.T. 671-679). On cross-examination Temple was shown the checks drawn by him on C.L.S. Bank and asked to identify any as having been the ones left with Petitioner. He was not able to make such identification (R.T. 794 et seq).

Charles Munea, an official of H.N. Bank testified that officers of the bank had authority to grant immediate credit to any depositor by permitting the depositor to negotiate or cash a check against uncollected funds; that until January 10, 1967, none of the checks deposited to the Nickward Account and drawn by Temple on the C.L.S. Bank had ever been dishonored by that bank; that this would be a factor that a banker would consider in determing whether

to permit a customer to draw upon or use uncollected funds; that the bank used computers in maintaining its ledgers and accounts; that if a check were drawn on the bank in excess of the present or current balance the computer would post the check and show the account to be in an overdraft situation; that the check would then be presented to an officer of the bank to determine whether the check was to be paid; that if payment were rejected the check would be returned unpaid to the bank from whence it had come and the account credited for the amount of the check to offset the previous debit entry. In the event that a check resulted in an overdraft and a deposit was made on the same day the customer's statement would not show an overdraft. It was the duty of Augustyn and other bank officers to convey information on overdrafts to Petitioner but Augustyn had authority, on his own, to approve a check which would create an overdraft for immediate payment (R.T. 127-163).

Robert Hooper, a general lending officer of H.N. Bank testified that on October 31, 1965, the Teepee, Inc. account showed a plus balance of $1,700 and that the Nickward, Inc. accounts from September through December of 1966 did not, at any time, show the account as being in an overdraft state as of the end of those months and showed plus balances at the end of

each month although there had been overdrafts during the month itself. Hooper had received instructions from Petitioner to call C.L.S. Bank on any checks drawn by Temple before approving them for cash or immediate credit of any form and had done so on several occasions after having spoken with Erickson and being told that the checks were good. Hooper was aware:

> "That this service was being done by Mr. Augustyn"

who was giving immediate credit on checks drawn by Temple and who had authority to approve overdrafts (R.T. 940-1057).

During each business day any deposits of checks or monies to an account would be credited to the account and placed upon a computer tape by a "proof machine operator". Similarly, each check drawn against an account at the bank would be debited to the account. In the event that a bank officer refused to approve a check which would overdraw the account, it would be returned to the proof machine operator who would immediately credit the account on the computer tape thus, in effect, concaling out the previous debit which had been entered. A "service bureau" picked up the computer tapes, processed them and the following morning delivered a "return item sheet" (Defendant's

Exhibit N) which listed "potential overdrafts" to the bank. This "return item sheet" thus listed checks drawn against accounts at the bank which would overdraw the account if honored. The bank was required to either honor or dishonor checks drawn against an account within 24 hours. These checks did not become "overdrafts" until such time as they were honored and the "return item sheet did not show or list the balances in the accounts reflected by the "potential overdrafts" listed thereon. It was the procedure for the "return item sheet" to be inspected each morning first by Augustyn and then by Petitioner, Hooper, and a Mr. Jekilek, after which time it was returned and kept in Augustyn's Department.

Each day, the "service bureau" delivered along with the "return item sheet" a document entitled "account analysis report". This report was basically a summary of the "return item sheet" but also reflected current balances in each account, overdrafts against accounts, variations or fluctuations in accounts, whether an overdraft was a "continuing overdraft" and contained a column entitled "kiting". The facts thus contained on this report would indicate that a check kite was going on and would print out this fact in the column entitled "kiting". Petitioner testified that he did not inspect this

report and that it was the function of the cashier and the operations department to do so (R.T. 940-1044; 1761-1793).

Nicholas McGahan, Jr., a special agent of the Federal Bureau of Investigation examined all of the various exhibits and records of the bank and prepared a schedule (Exhibit 17) which showed the "potential" loss. The final figure on the potential loss schedule would turn into an actual loss only after the "kite" was broken. The balances in the accounts at both banks were created as the result of worthless checks being exchanged and were, in reality, a "paper balance" and not an actual balance. In essence, there were checks "in float" between H.N. Bank and C.L.S. Bank. This scheme was known as a "kite". In such check kiting situations either one or both of the banks would suffer the loss depending upon who would send the dishonored checks back first (R.T. 1267-1307; 1331; 1354-1366).

During the trial Petitioner prepared Exhibit "O" from the information contained in Exhibit "N". Exhibit "O" contained a list of 120 occasions when checks had been approved by someone at the H. N. Bank for either deposit or cash to Temple. Petitioner testified that he had approved only four of the 120 items, one of which (Exhibit 60) overdrew Temple's account in the sum of $34.08 and the second of which(Exhibit

61) overdrew Temple's wife's account in the sum of $60.78. These were nominal accounts and he had no knowledge of any problems with these accounts. Petitioner approved a third overdraft (Item 74) after being advised by Augustyn that Temple had made a $55,000 deposit. Augustyn's initials appeared on the sheet connected with this transaction. Petitioner additionally approved a fourth item which consisted of a check in the sum of $1,000 (Exhibit 93) and which created an overdraft of $852.21. Petitioner made a notation that a deposit had been made to cover this check but did not recall who had advised him of this fact. Except for these four transactions, Petitioner testified that he had nothing whatever to do with the remaining 116 items; that the handwriting beside these items was not his and that the writing had not been on the sheets at the time the sheets had come across his desk (R.T. 1593-1605).

Handwriting expert Don Mire compared the written notations alongside the 120 items contained on the "return item register" (Exhibit N) with the known handwriting of Petitioner. He substantiated Petitioner's testimony that Petitioner's handwriting appeared only on the four items testified to by Petitioner (R. T. 1606-1633).

Jeri Carroll, the"return items clerk" for H. N. Bank was familiar with Temple's accounts. She testified that Augustyn was the first person to see the checks returned by C.L.S. Bank and that she was the second person to do so. Augustyn had instructed her that whenever checks came in on Temple's account she was to ask him for instructions. On some occasions Augustyn instructed her to "reclear the items"; on other occasions told her to charge the items against the account and that other times gave her a cashier's check or "cash in ticket" (signifying a deposit of cash) to deposit to Temple's account for the checks which had been dishonored by C.L.S. Bank. On one occasion she called Petitioner's attention to a $10,000 third party check which had been drawn on a local bank and dishonored. Petitioner instructed her to call the bank and verify the check. She did so, was advised that the check was good, recleared the item and never saw it again. (R.T. 1333-1340).

Petitioner testified that sometime in June or July of 1966 he observed certain of Temple's checks on the "potential overdraft list" (Exhibit N). He instructed all employees that any checks deposited or negotiated by Temple which might overdraw his account must be "verified and guaranteed". He became aware of the fact that Temple had an account at C.L.S.

Bank when Temple presented a check that he desired to negotiate and asked Petitioner to call Erickson to verify the check. Petitioner spoke with Erickson who guaranteed the check (R.T. 1956-1963).

Petitioner testified that after receiving telephone calls from Metropolitan Bank in September of 1966 he spoke with Augustyn who told him that there was a "mixup" and that the matter had been straightened out. After receiving advise from Continental Bank in November of 1966 concerning Temple's insufficient fund checks he again made inquiry of Augustyn who advised him that the situation had been corrected and that Temple had "good funds" in the bank. After being assured by Augustyn that nothing was amiss, Petitioner did no further checking or reviewing of an of Temple's accounts or records and did not explore it any further (R.T. 1965-1967; 1890-1906). After he was advised by Gregory that Temple's checks were being returned he checked with Augustyn and was told that no checks were being returned. He had complete faith in Augustyn and did not look at any of the records concerning the Nickward or Temple accounts following his conversations with either Mr. Gregory or Mr. Ely (R.T. 1929-1943). Petitioner testified (R.T. 1907):

> "I was being reassured that my instructions were being followed, and that is the way it was, I was told that the checks were good, we had thousands, not thousands but hundreds, of checks going through the bank, they were all paid, I had no notice, no constructive notice of any check being actually returned to the bank and charged back to the bank ---".

On January 10, 1967, Petitioner discovered that his orders instructing bank employees to telephone and have all checks negotiated by Temple "guaranteed" were not being followed. He asked Augustyn whether he had called on every one of the checks and Augustyn replied that he had called on most of them but not all. Asked why he had not called on each and every one of the checks Augustyn replied that each time he had called Erickson he had been advised by Erickson that the checks were good and "why do you bother calling?" (R.T. 1957-1963). Petitioner further testified with respect to all checks drawn by Temple on C.L.S. Bank that he had instructed his employees "to get hard cash or to get a guarantee of payment from Erickson"; that a banker had to use his judgment and that Augustyn was charged with reviewing each deposit (R.T. 1964).

Petitioner denied having ever received money from Temple either directly or indirectly. He contended that the bank records showed that it was Augustyn or someone other than himself who had approved numerous checks negotiated by Temple for cash or immediate credit. He denied receiving the christmas presents as testified to by Temple and asserted that he had received only a cigarette lighter and sweater from him for Christmas.

Limitations of space preclude us from any serious attempt to summarize the testimony of Petitioner or the evidence produced on his behalf. The essence of his defense was that he did not become aware of a "kite" until January 10, 1967, at which time he conferred with Augustyn as to the balance in T emple's accounts and was advised that there was over one million dollars in the account. He believed that he was protecting the best interests of the bank by entering into what he thought was a valid, binding agreement with C.L.S. Bank whereby that bank would return only $450,000 of Temple's checks upon Petitioner's bank wiring the sum of $500,000.

When the kite thus "broke" on January 10, 1967, Petitioner believed that the One Million Dollars in Temple's account would still leave the bank without any loss whatsoever if he wired the $500,000 requested by the C.L.S. Bank

and that bank lived up to its agreement. C.L.S. Bank did not choose to honor its commitment to Appellant and Appellant's bank also sustained a loss.

Attorney Gerald Romanik testified that he was told by Temple on January 26, 1967, that Petitioner was not culpable; that Augustyn had worked hard to keep things away from Petitioner and that Erickson was Temple's partner and had profited (R.T. 1415-1422). Neither Erickson nor Augustyn testified at the trial. During its charge to the jury the trial court commented upon the evidence and the testimony.

Other pertinent facts to the questions presented on this appeal are discussed in their appropriate places in the Argument.

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR IN COMMENTING UPON THE EVIDENCE; IN MISQUOTING THE EVIDENCE AND TESTIMONY AND DRAWING UNWARRANTED CONCLUSIONS THEREFROM; AND IN EXPRESSING ITS OPINION THAT THE QUESTION FOR THE JURY WAS WHETHER TO BELIEVE PETITIONER AS AGAINST ALL OF THE OTHER EVIDENCE IN THE CASE. MOREOVER, THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY INTERJECTING ITSELF INTO THE PROCEEDINGS; QUESTIONING WITNESSES AT GREAT LENGTH AND INTERFERING WITH THE LOGICAL ORDER OF PRESENTATION OF THE EVIDENCE AND CROSS-EXAMINATION OF PROSECUTION WITNESSES.

During its instructions to the jury, the trial court stated (R.T. 2569-2570):

"Ordinarily I do not comment on the evidence in a case to a jury. In this case I am going to make a few comments concerning the evidence in the case, but you are at liberty to wholly disregard my comments and reach your own conclusion.

It seems to me that this case could be an exceedingly long and difficult one for you to determine but, as I sat here and saw the case it becomes a question of whether or not Mr. Jones is to be believed and his witnesses as against all the other witnesses and evidence in the case.

Mr. Jones has disclaimed any knowledge of the kite before January 10. The defendant produced Exhibit N which, as you will remember, is that big voluminous thing, and among other things I went through and just picked a month, the month of October, in which there were 21 business days and on 17 of those business days that Exhibit shows, and Mr. Jones said he saw it, that Exhibit shows that the account of Nickward, Inc. was overdrawn between $4,000 and $175,000, and taking the whole 21 days and giving

credit for the four days in which there was a credit balance and subtracting it, the average overdraft per day during October was $48,911. This was the month of October and Mr. Jones said he saw all that and that he did not do anything because he had given instructions.

As I have indicated, it seems to me to be a question of whether or not you are going to believe him entirely or disbelieve all of the other evidence in the case.

I need not review the evidence as was done by the prosecutor here in detail, but let us disregard the testimony of Temple, let's assume that Edward Temple here is not worthy of truth, you must determine whether or not the things that he did testify to are corroborated by other circumstances and incidents that can't be changed, such as a person's testimony can."

We submit that the trial court's comments constituted "plain error" and that while the trial court added the requisite disclaimer that the jury could disregard its comments if it chose to do so, it placed an undue emphasis on the comments that it did make by advising the jury that it did not ordinarily comment on

evidence but was going to do so in this case. We cannot, of course, know whether the court's statement that it did not ordinarily comment on the evidence was a correct one. We can, however, and do, submit that the jury could only conclude from the remarks made by the court, that the trial judge believed Petitioner to be guilty and that it chose to comment upon the evidence because the court felt that the issues were simple and that the sole question to be resolved was "whether or not you are going to believe him (Petitioner) entirely or disbelieve all of the other evidence in the case".

The trial court further seriously misquoted the evidence on a crucial issue during its above quoted comments by claiming that the court picked the month of October at random from the sheets contained in Exhibit "N" and that Petitioner "saw all this" and "did not do anything". This statement by the court was unwarranted, and as we shall point out herein, based upon the trial court's erroneous recollection of the contents of Exhibit "N".

The trial court confused Exhibit "N" with Government Exhibit "93". It should be recalled that each evening the Service Bureau prepared a sheet which showed potential overdrafts and which was known as a "return item sheet". The evidence was clear that this document circulated daily from Mr. Augustyn to

Petitioner and thence to two other officers after which time it was returned to Augustyn. It was conceded that these documents (Exhibit "1") were checked by Petitioner each morning. However, these documents did not show or list the balances in the accounts of the checks reflected therein and upon which accounts the "potential overdrafts" were drawn.

The Service Bureau also prepared and delivered to the bank each morning an "account analysis report". This report did reflect the current balances in each account, fluctuations in those accounts; whether an overdraft was a "continuing overdraft"; and also contained a column entitled "kiting". The facts thus contained in the "account analysis reports" would have indicated that a check kite was going on. Petitioner testified that he did not inspect these "account analysis reports" as this was a function of the cashier (R.T. 940-1044 & 1761-1793).

Toward the conclusion of the trial, and after Petitioner had testified at great length, counsel and the court engaged in a colloquy (R.T. 2134-2138) wherein the prosecutor indicated that she had a huge stack of "account analysis reports" which had been prepared by the service bureau for the Hollywood National Bank for the period from September, 1966, through

January, 1967. When the prosecutor indicated a desire to question Appellant concerning those reports which did not contain any initials or notations by anyone, the Court suggested that because of the voluminous number of documents counsel should "pick out maybe one, two, or three representative days, just so that the jury will know what was on there and what it was" (R.T. 2135); and when defense counsel objected, the court stated "he (Petitioner) says he did not look at them" (R.T. 2135). From out of this large mass of "account analysis reports" those reflecting records of the Hollywood National Bank for the first ten business days of October, 1966, were marked as Exhibit 93.

From the colloquy which occurred between counsel and the court (R.T. 2135-2137) it is quite evident that even the prosecutor agreed that the "account analysis reports" (Exhibit 93), unlike the "return item sheets" which comprised Exhibit K, did not circulate in the bank but were kept in the Cashier's Department under the custody of Mr. Augustyn. Counsel and the court then discussed which of the "account analysis reports" (Exhibit 93) should be selected and shown to the jury as representative of the voluminous number of the reports produced by the prosecutor (R.T. 2138) and, at the suggestion of defense counsel, the

since in reality it was actually Exhibit 93 and Not Exhibit N that the court showed to Petitioner. There was indeed quite a difference between the contents of Exhibit N and the contents of Exhibit 93 since the documents which comprised Exhibit N would not have indicated to Petitioner the balance in the Nickward Account for each day and would further not have indicated that a kite was in progress. It was the sheets comprising Exhibit N that Petitioner inspected each morning. Although the sheets comprising Exhibit 93 would have indicated to Petitioner the daily balance in each account and the fact that a kite may have been in progress, it is clear that Petitioner did not inspect the sheets which comprised Exhibit 93, nor did he ever testify that he had done so. The trial court confused Exhibit 93 with Exhibit N and erroneously led the jury to believe that Petitioner had testified to having examined, on a daily basis, documents which would have indicated the existence of a kite. This error was crucial and of devastating proportions. Only a new trial can cure it.

Having thus singled out the above referred to phrase of Petitioner's testimony and misquoting the evidence, the trial court preceded its erroneous recitation of Petitioner's testimony by telling the jury that as it sat

there and saw the case it became a question of whether or not Petitioner "is to be believed and his witnesses as against all the other witnesses and evidence in the case" and, following its erroneous recitation of the evidence concluded by again stating that "it seems to me to be a question of whether or not you are going to believe him (Petitioner) entirely and disbelieve all of the other evidence in the case". We submit that Petitioner was grossly prejudiced by the court's remarks and that the comments of the court constituted plain error.

In Quercia v. United States, 289 U.S. 466, 53 S. Ct. 698 (1933), the United States Supreme Court had occasion to set down certain guidelines with respect to the conduct of a trial court in commenting upon evidence, In reversing a judgment of conviction the court stated:

> "This privilege of the Judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a witness. He may analyze and dissect the evidence, but he

may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling'. This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be onesided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.' (citations). He may not charge the jury 'upon a supposed or conjectural state of facts, of which no evidence has been offered'." 289 U.S. at 470.

The Court, in reversing the conviction noted that:

"In the instant case, the trial judge did not analyze the evidence; he added to it, and he based his instruction upon his own addition ---". At Page 471.

In Rossi v. United States (8th Cir. 1925), 9 F2d 362, the Court reversed a conviction remarking:

> "The Court then discussing the evidence as to the night when the alleged sale was made, which was March 23, 1925. Miss Vincent's testimony (she being a witness for the defense), under the erroneous statement by the Court of the evidence, corroborated West as to his meeting with defendant on the night of the 23rd of March, when in fact she testified she saw him on the 24th. The effect on a jury of such statement by the Court would be to practically destroy the evidence of the defendant and of Calabrese as to defendant not meeting West on the night of the 23rd. Juries give great weight to any statement by the court. It seems to us this erroneous statement of evidence by the court to the jury, with the inevitable result of great prejudice to the defense, was so grave an error as to require a reversal of the case." At Page 367.

In Minner v. United States (10th Cir. 1932) 57 F2d 506, the court, reversing a conviction after reviewing the trial judge's

comments on the evidence stated:

> "But in summing up and commenting on the evidence, the Trial Judge should be governed by certain well recognized limitations inherent in the very nature of the judicial office. He should state the evidence fairly and accurately, both that which is favorable and that which is unfavorable to the accused. His statements should not be argumentative, but impartial, dispassionate, and judicial; and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts." At Page 512.

In United States v. McCarthy (3rd Cir. 1962) 301 F2d 796, a judgment of conviction was reversed where the trial judge, as part of his charge to the jury, misstated the testimony which had been given during the trial. The court stated (Page 802):

> "The judge was under a mistaken impression, which neither counsel ever corrected, as they should have, that Nichols had testified the defendant "saw" him. Conveying that thought to the jury was of major damage to defendant. It could have destroyed whatever chance he had of trust by the jury in his evidence for he denied that he saw

Nichols then. ---.

This portion of the charge was plain error in its unintentional misstatement of important fact and in its use of the illustrations." At Page 802.

In Benes v. United States (6th Cir. 1960) 276 F2d 99, a judgment was reversed where the Trial Judge misstated the facts in his instructions and exceeded the bounds of fair comment.

We submit that taken as a whole, the comments of the Trial Court were inappropriate and exceeded the bounds of the Court's right to comment upon the evidence. The Court's comments were highly prejudicial to Petitioner, and in effect, intimated that Petitioner was guilty.

The limitations on Trial Courts are set forth in Billeci v. United States (D.C. Cir. 1960) 184 F2d 394:

"...In exceptional cases he may even express his opinion upon the evidence, or phases of it. But there is a constitutional line across which he cannot go. The accused has a right to a trial by jury .... A judge cannot impinge upon that right any more than he can destroy it. He cannot press upon the jury the weight of his influence any more than he can eliminate the jury altogether. It is for this

reason that the courts have held time and time again that a trial judge cannot be argumentative in his comments; he cannot be an advocate; he cannot urge his own view of the guilt or innocence of the accused." At Page 402, 403.

The trial had been a long and complicated one. Numerous witnesses had testified and literally mountains of physical evidence had been introduced. The issues were certainly not quite as simplistic as the comments would have led the jury to believe. The jury should have been left free to evaluate and pass upon all of the evidence without being told that to believe Petitioner was equivalent to disbelieving all of the other evidence in the case. The jury could quite properly have believed much of the evidence and yet determined that Petitioner had been grossly negligent and had acted without criminal intent. The comments by the court additionally served to elevate the testimony of accomplice Temple to the same level or degree of truthfulness as the evidence produced by numerous other government witnesses whose testimony was not disputed.

Juries give great weight to any statement by the court (Rossi v. United States, 9 F2d 362) and the trial court's statements should

not be argumentative, but impartial, dispassionate and judicial and they should be so carefully guarded that the jurors are left free to exercise their independent judgment upon the facts, Minner v. United States, supra. In Dinger v. United States (8th Cir. 1928), 28 F2d 548, the judgment of conviction was reversed where the Court of Appeals construed the trial judge's charge as directing the jury to believe the government's witnesses and then instructing them that if they did so believe the Government witnesses they must find the defendant guilty. The court held such comment to be tantamount to a direction to convict which was impermissible in a criminal case.

The comments of the trial court here placed the jurors in an untenable position from which there was hardly any escape but to find Petitioner guilty. The comments of the trial court here were, in essence, tantamount to a directed verdict of guilty. The fact that the trial court further instructed the jury that they were the sole judges of the evidence and that they were at liberty to disregard the court's remarks did not cure the error. United States v. Gollin, (3rd Cir. 1948), 166 F2d 123; Dinger v. United States, (9th Cir. 1928), 28 F2d 548; Quercia v. United States, supra.

Limitations of space preclude us from setting forth the virtually hundreds of questions

that were asked by the trial judge of the witnesses. We believe that the record will reflect that the trial court interrupted the questioning of virtually all witnesses on numerous occasions for the purpose of interjecting both its questions and its comments. We submit that the total effect of such course of conduct was to interfere with the logical order of presentation of the defense evidence and that the court's conduct further seriously hampered defense counsel in cross-examination of the prosecution witnesses. The court, further so interjected itself into the examination of Petitioner so as to create the impression that Petitioner was not being truthful in his testimony and that the jury should disbelieve him.

On numerous occasions, the trial judge appeared to lend assistance to the prosecutor in the cross-examination of Petitioner. On other occasions the court expressed its disbelief of Petitioner in such a manner so as to virtually imply that Petitioner was guilty. For example, during one of the many times at which the trial judge interrupted the proceedings to interpose his own questions, he said (R.T. 2245):

> "Yes, but you had those checks, you had over a million dollars worth of checks in float in the Chicago Lake State Bank that the Hollywood National

Bank had paid against the Nickward, Inc. account, $450,000 paid or given immediate credit for and $900,000 in two days there and you refer to that in your memorandum, one of the $450,000. I can't understand how you figured you still had over a million dollars on deposit."

Petitioner thereupon attempted to explain his computations and the court again interjected (R.T. 2247):

"Well, then on the 9th the statement shows $550.02 balance and on the 10th $115,000 with your $450,000 checks returned by them you show a balance of a Million Dollars. How did $115,000 come up plus $500. make a Million? That is what I can't understand."

We submit that the trial court in these and numerour other instances assumed the role of a prosecutor and severely prejudiced Petitioner's right to a fair trial.

The case of People v. Mahoney, 201 Cal. 618, 258 P. 607, is frequently quoted in this connection:

"We have presented sufficient to show a state of affairs which trial judges should not permit and which may be pointed to as an example as to what they should not do in trials of

lawsuits. If they will lend themselves to such methods, if they will so intemperately espouse the cause of the prosecution in criminal cases, no man charged with a penal offense is safe, whether he be guilty or innocent. Every defendant under such a charge is entitled to a fair trial on the facts and not a trial on the temper or whimsies(sic) of the judge who sits in his case." (201 Cal. 626).

The Court gave this answer to the People's feeble contention that the remarks were merely facetious and harmless:

"Such an attitude on the part of the trial court as that here disclosed cannot be passed over so lightly. Jurors reply with great confidence on the fairness of judges, upon the correctness of their views expressed during trials. For this reason, and too strong emphasis cannot be laid on the admonition, the judge should be careful not to throw the weight of his judicial position to a case, either for or against the defendant . . . when, as in this case, the trial court persists in making discourteous and disparaging remarks to the defendant's counsel and witnesses and others, frequent comment

> from which the jury may plainly perceive that the testimony of the witnesses is not believed by the judge and in other ways discredit the cause of the defense, it is transcended so far beyond the pale of judicial fairness as to render a new trial necessary ... The fact that a record shows a defendant to be guilty of a crime does not necessarily determine that there has been no miscarriage of justice. In this case the defendant did not have a fair trial guaranteed to him by law and the constitution." [201 Cal. 626].

See also People v. McNeer, 8 Cal. App. 2d 676, 47 P2d 813; People v. Williams, 55 Cal. App. 2d 696, 131 P2d 851.

II.

THE TRIAL COURT ERRED IN FAILING TO ADVISE PETITIONER'S TRIAL COUNSEL THAT IT INTENDED TO COMMENT ON THE EVIDENCE DURING ITS CHARGE TO THE JURY SO THAT TRIAL COUNSEL MIGHT HAVE BEEN PERSONALLY PRESENT DURING THE INSTRUCTION OF THE JURY AND SO THAT HE COULD HAVE OBJECTED TO THE COMMENTS BY THE COURT AND TO THE INSTRUCTIONS.

The jury was instructed on March 1, 1968. On this occasion Petitioner's trial counsel (Karl Ransom) did not appear and was not present during the proceedings. Petitioner was represented by Attorney Nancy McKissack (R.T. 2587) during the court's charge to the jury.

The record is clear that Mrs. McKissack had never before appeared on behalf of Petitioner during the trial. She could not have been expected to have been familiar with the evidence adduced during this long and complex trial.

The trial court commented quite extensively on the evidence, without objection from Mrs. McKissack.

The court should have properly advised Mr. Ransom, on the previous day, that it intended to comment at length on the evidence so that he

might have chosen to be personally present during the charge to the jury and voiced proper objections to the court's comments. Mr. Ransom could have, also, corrected the Court in what we have herein claimed to have been misstatements of the evidence and testimony.

The trial court should have also advised Mrs. McKissack that it intended to comment upon the evidence and afforded her an opportunity to request a recess or adjournment so that Mr. Ransom might be personally present to protect the interests of Petitioner. The action taken by the Court prejudiced the right of Petitioner to a fair trial and precluded defense counsel from making proper objections to the Court's charge and comments. In view of these facts, we submit that the questions raised on this appeal should be treated as if proper objections to the Instructions and comments of the court had been made by defense counsel.

III

THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY THAT THE TESTIMONY OF AN ACCOMPLICE MUST BE RECEIVED WITH CAUTION AND WEIGHED WITH GREAT CARE. SUCH ERROR WAS PREJUDICIAL NECESSITATING A REVERSAL OF THE CAUSE.

The Government's case was virtually entirely predicated upon the testimony of Edward Temple, an indicted co-conspirator who entered a guilty plea to two counts of the Indictment. Temple was thus indisputably an accomplice who conceived, initiated and brought about a check kiting scheme which resulted in financial loss to the Chicago Lake State Bank and the Hollywood National Bank, of which Petitioner was president.

Temple's testimony was damaging to Petitioner since he testified to allegedly delivering sums of money and other gifts to him as well as testifying at length to conversations had with Petitioner and alleged co-conspirators. The trial court failed to instruct the jury, as is traditionally done, that the testimony of an accomplice "is always to be received with caution and weighed with great care". (See Mathes & DeVitt, Federal Jury Practice and Instructions 9.04).

As long ago as 1909, the Supreme Court observed that accomplice testimony "ought to be received with suspicion and with the greatest of care and caution". (Crawford v. United States, 212 U.S. 183, 204; 29 S. Ct. 260,268). In 1952 the Supreme Court cited as a modern trend the admission of accomplice testimony but subject to "broad lattitude" in cross-examination and "careful instructions". (On Lee v. United States, 343 U.S. 747, .757; 72 S. Ct. 967).

Williamson v. United States (5th Cir. 1964) 332 F2d 123, as does this case, involved the prosecution of a bank officer who was implicated through the testimony of an accomplice. Although no request was made for an "accomplice instruction", the Court nevertheless reversed the judgment of conviction for failure to give the instruction and observed:

> "In the final analysis, it is not the parties who determine the charge the judge gives to the jury. The obligation rests squarely on the shoulders of the trial judge , . . We think the omission of the charge on accomplice testimony was plain error, and the only way to eradicate it is to grant a new trial."

At 132, 133.

The Court of Appeals, in Williamson,

supra, recognized the reason for giving the cautionary accomplice instruction. While acknowledging the necessity for the government's use of the testimony of lawbreakers and participants in the very crimes under scrutiny, the Court stated:

> "But law is in step with human nature when it ordinarily recognizes that testimony from this course (sic) has to be scrutinized most carefully. That results normally in the giving of a traditional instruction."

The United States Supreme Court has recently expounded in Washington v. Texas, 388 U.S. 14, 22 (1967):

> "Common sense would suggest that (an alleged accomplice) often has a greater interest in lying in favor of the prosecution rather than against it, especially if he is still awaiting his own trial or sentencing. To think that criminals will lie to save their fellows but not to obtain favors from the prosecution for themselves is indeed to clothe the criminal class with more nobility than one might expect to find in the public at large."

Finally, in McMillen v. United States (1st Cir. 1967) 386 F2d 29, this court reversed

a judgment of conviction for giving the presumption of truthfulness instruction as applied to the testimony of witnesses combined with failure to give a cautionary instruction as to testimony of an accomplice although no requests for or objections to the court's instructions were made. The court stated:

> "We are not here concerned with technical error or with prejudicial error, or even with our view of what we may deem to be the obvious guilt or innocence of the individual appellants. In the words of the Federal Rules of Criminal Procedure 52(b) we are concerned only with any errors 'affecting substantial rights'. As the Supreme Court stated in United States v. Atkinson, 297 U.S. 157, . . . 23 may - and we must - notice errors which 'seriously affect the fairness *** of judicial proceedings'." At Page 35.

Similarly, in the instant case, the jury was told that a witness was presumed to speak the truth and inasmuch as most of the case hinged on the testimony of accomplice witnesses the jury was left with the impression that their testimony was prima facie truthful rather than prima facie suspect.

Had the cautionary accomplice instruction been requested, it appears clear that it would have been reversible error to decline to

give it. Williamson v. United States (5th Cir. 1964) 332 F2d 123; Phelps v. United States (5th Cir. 1958) 252 F2d 49, Freed v. United States (49 App. D.C. 1920), 266 F. 1012; Fletcher v. United States (81 U.S. App. D.C. 1946), 158 F2d 321.

We most respectfully submit that the trial court committed "plain error" in failing to instruct the jury per the language of the accomplice instruction suggested in Mathes & DeVitt, Federal Jury Practice and Instructions Section 9.04.

See also Hall v. United States (5th Cir. 1964), 325 F2d 817; Dunn v. United States (5th Cir. 1963), 318 F2d 89; United States v. Masino (2d Cir. 1960), 275 F2d 129; Fletcher v. United States (81 U.S. App. D.C. 306 1946), 158 F2d 321; Freed v. United States (49 App. D.C. 392), 266 F2d 1012.

IV

THE PROSECUTOR SUPPRESSED EVIDENCE; FAILED TO COMPIY WITH DISCOVERY ORDERS MADE BY THE COURT, AND THE TRIAL COURT ERRED IN PERMITTING THE PROSECUTOR, OVER OBJECTION, TO USE EVIDENCE WHICH THE PROSECUTOR HAD SUPPRESSED AND WITHHELD FROM INSPECTION OF THE DEFENSE FOR THE PURPOSE OF IMPEACHING PETITIONER.

Toward the close of the prosecution's cross-examination of Petitioner and after Petitioner had given his testimony that he had never received any monies from Temple or anyone on behalf of Temple, the prosecutor introduced Exhibits 85 through 90. One of these documents (Exhibit 87) was a Cashier's Check in the sum of $6,000 from the Hollywood National Bank payable to Carl Long (R.T. 2145). The prosecutor also introduced Exhibit 89 which was a Cashier's Check issued by the Security First National Bank. This check had been purchased by Carl Long and was made payable to Petitioner. Petitioner negotiated the check and contended that the proceeds had constituted a loan to him by Long and that the loan had later been repaid. (R.T. 2181-2198).

A lengthy colloquy occurred with respect to these impeaching documents and defense counsel vigorously objected to the prosecutor being permitted to use them. He further charged that the Prosecutor had suppressed their existence until after Petitioner had testified on his own behalf and that the prosecutor had further violated the court's discovery orders and failed to show these impeaching documents to defense counsel prior to the time that Petitioner took the stand to testify. These impeaching documents had been available to the prosecutor but she claimed that she had not advised defense

counsel of them because she had not known, at the commencement of the trial, that she would intend to use them. She stated that she became aware of their existence after Temple had pled guilty. The lengthy colloquy with respect to these impeaching documents was set forth at R.T. 2144-2153.

The trial court characterized the documents as "impeaching documents" and held that they were thus not within the scope of the discovery orders which had been made earlier by the court. (R.T. 2148, 2152).

Defense counsel contended that these documents were properly part of the Government's case in chief and that they were in fact impeaching documents. The court contended that they were in fact impeaching documents since the prosecutor would have no way of knowing what Petitioner's testimony was going to be when he got on the witness stand. The objection to their introduction and use was overruled and Petitioner's objection to the questions on cross-examination of Petitioner concerning those documents were overruled. (R.T. 2152-2153).

As we shall point out, the evidence suppressed by the prosecutor was discoverable whether or not it was properly part of the Government's "case in chief" or whether it was "impeaching evidence".

It has been abundantly clear since the decision in Brady v. Maryland, 373 U.S. 83, 87, that the government may not withold evidence favorable to the accused whether done intentionally, negligently, or in good faith. The court stated:

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

As the Court of Appeals held in United States v. Consolidated Laundries Corporation (2nd Cir. 1961) 291 F2d 563:

> "The prosecutor must be vigilant to see that full disclosure is made at trial of whatever may be in his possession which bears in any material degree on the charge for which a defendant is tried. In the long run it is more important that the government disclose the truth so that justice may be done than that some advantage might accrue to the prosecution toward ensuring a conviction.

United States v. Zborowski (2nd Cir.) 271 F2d 661, 668.

"Accordingly we hold that the judgments must be reversed and a new trial granted." At Page 571.

In United States v. Consolidated Laundries Corporation, supra, an unknown government employee not connected with the prosecuting attorney had suppressed certain evidence. In commenting upon the evidence which had been suppressed through no fault of the prosecutor, the Court stated, 291 F2d 563, at 570:

"This duty was breached by someone in the government's employ. Through unexplained acts, certain of the papers in the government's custody were misplaced and consequently were not shown to the defendants when inspection was ordered. This failure to produce deprived the defendants of evidence which would have been helpful to them on points which the findings show of great importance in determining their guilt. For practical purposes the Owen papers were temporarily lost. We hold this was negligence chargeable to the prosecution. ---."

The prosecutor and the trial court were in error in their belief that the prosecution was not required to disclose the existence of the Cashier's Check to the defense by virtue of previous discovery orders which

had been made in the case and to which counsel and the court referred to in their colloquy concerning these exhibits. The trial court committed an error in overruling Petitioner's objections to the use of these documents and in overruling Petitioner's objections to the prosecutor questioning him concerning those documents by concluding that the items were "impeaching evidence" and thus not subject to discovery. We believe that the quite recent decision in Williams v. Dutton, (5th Cir. 1968) 400 F2d 797, is dispositive of this issue and that Petitioner was entitled to have the prosecutor reveal the existence of the Cashier's checks referred to herein whether the same were "impeaching evidence" or not, prior to the time that Petitioner took the stand to testify on his own behalf.

In Williams v. Dutton, supra, the court stated:

> "It is now clear that Brady (Brady v. Maryland, 373 U.S. 83) imposes an affirmative duty on the prosecution to produce at the appropriate time requested evidence which is materially favorable to the accused either as direct or impeaching evidence." AT Page 800.

The prosecutor here, was admittedly in the possession of the impeaching Cashier's

Checks for a lengthy period of time prior to their introduction into evidence. They were introduced by the prosecutor on the last day of a lengthy trial and after Petitioner had testified to great extent on his own behalf and had been cross-examined at length. We submit that the record makes it abundantly clear that the prosecutor was well aware of the existence of the impeaching Cashier's Checks but did not show them to the defense as required by previous discovery orders since she felt the documents "to be impeaching evidence" and thus outside the scope of the discovery orders. We thus submit that the evidence was intentionally suppressed. It is, however, immaterial whether the evidence was withheld intentionally or inadvertently. See Consolidated Laundries v. United States, supra. In either event, the defense was deprived of its right to be informed of, and to inspect, material evidence bearing on the guilt or innocence of Petitioner. The conduct of the prosecutor and the rulings of the court in this regard constituted prejudicial error.

V.

THE GOVERNMENT SHOULD BE PRECLUDED FROM CHARGING THE CRIME OF CONSPIRACY WHERE THE ALLEGED CONSPIRACY HAS RESULTED IN SUBSTANTIVE CRIMES WHICH

ARE ALSO CHARGED IN THE SAME INDICTMENT.

In addition to the conspiracy to commit varied crimes alleged in Count One of the indictment, five additional counts were likewise levelled against Petitioner charging that the conspiracy achieved fruition in the form of numerous substantive offenses. This was not a case wherein a conspiracy was disrupted before its objects were attained. If there was a criminal conspiracy, it bore fruit. We submit that this Court should disapprove of the practice of pressing the crime of conspiracy where the alleged conspiracy resulted in substantive crimes which are also charged in the indictment.

Mr. Justice Jackson speaking for three members of the United States Supreme Court in Krulewitch v. United States, 336 U.S. 440, 445 (1949), severely condemned the prosecution of a conspiracy under the above circumstances. He exhorted:

> "This case illustrates a present drift in the federal law of conspiracy which warrants some further comment because it is characteristic of the long evolution of that elastic, sprawling and pervasive offense. Its history exemplifies the "tendency of a principle

to expand itself to the limits of its logic".

The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice." See also Kotteakos v. United States, 328 U.S. 750 (1946); United States v. Borelli (2d Cir. 1964) 336 F2d 376, 380; United States v. Johnson (4th Cir. 1964) 337 F2d 180.

We shall not further burden this court with a recitation of Justice Jackson's concurring opinion in Krulewitch v. United States, supra. The superb advantages which are gained by the prosecution as the result of filing a charge of conspiracy and the immense burdens which a defendant must bear in defending against the charge are quite succinctly enumerated in that opinion.

In United States v. Falcone (2d Cir. 1940) 109 F2d 579, 581 Judge Learned Hand observed:

". . . so many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main

> offenders. That there are opportunities of great oppression in such a doctrine is very plain, and it is only by circumscribing the scope of such all comprehensive indictments that they can be avoided."

More recent pronouncements by our courts have recognized the evils inherent in an indictment charging conspiracy. In Delli Paoli v. United States, 352 U.S. 232 (1957) Justice Frankfurter stated, in a dissent joined by Justices Black, Douglas and Brennan:

> "Prosecutions for conspiracy present difficulties and temptations familiar to anyone with experience as a federal prosecutor. The difficulties derive from observance of the rules governing evidence admissible against some but not all defendants in a criminal case. The temptations derive from the advantages of prosecuting in one trial two or more persons collaborating in a criminal enterprise." At Page 246. 1/

In view of the criticism which has been recognized and levelled against the evil inherent

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1/ This case has recently been overruled by Bruton v. United States, 88 S. Ct. 1620 (1968)

in the filing of and defending against a charge of conspiracy, it is respectfully submitted that the court should disapprove the practice of charging conspiracy in a separate count when the only objectives of that conspiracy are alleged to be a violation of specific statutes which are also charged as substantive counts in the same indictment.

As Mr. Justice Jackson concluded in Krulewitch v. United States, supra:

> "We should disapprove the doctrine of implied or constructive crime in its entirety and in every manifestation. And I think there should be no straining to uphold any conspiracy conviction where prosecution for the substantive offense is adequate and the purpose served by adding the conspiracy charge seems chiefly to get procedural advantages to ease the way to conviction."

CONCLUSION

The Petition for Writ of Certiorari, Petitioner respectfully prays, should be granted and the judgment reversed.

Luke McKissack

LUKE McKISSACK
Attorney for Petitioner

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is 6430 Sunset Boulevard, suite 521, Hollywood, California 90028. On June 4, 1970, I served the within Petition for Writ of Certiorari on the plaintiff and respondent in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

United States Attorney
Federal Courthouse
312 N. Spring Street
Los Angeles, California 90012

Solicitor General
Department of Justice
Washington, D. C. 20530

I declare that the foregoing is true and correct.

Executed on June 4, 1970, at Los Angeles, California.

Geraldine Cornwell

Geraldine Cornwell

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* vs. J. NORMAN JONES, *Defendant-Appellant.*	No. 23,594

[April 7, 1970]

Appeal from the United States District Court for the Central District of California

Before: BARNES and HUFSTEDLER, Circuit Judges, and PENCE,* District Judge

BARNES, Circuit Judge:

This appeal is from a judgment of conviction of the one defendant remaining after three codefendants entered pleas of guilty to one or two counts of a nine count indictment charging a violation of 18 U.S.C. §§ 371, 1341, or 1343. Appellant was convicted on six counts, and sentenced concurrently to eighteen months to five years on each count.

In the vernacular, appellant was charged with large scale "check kiting."

Appellant raises six alleged errors relating to the conduct of the trial judge; two more as to the misconduct of the prosecutrix; three as to instructions; four as to the sufficiency of the evidence; one as to the form of the indictment; and one alleging a fatal variance between pleadings and proof.

We find no error, and we affirm.

*Hon. Martin Pence, Chief Judge, United States District Court for the District of Hawaii, sitting by designation.

EXHIBIT "A"

1. *Fatal Variance and Form of Indictment*

(Appellant's Argument "I")

Appellant urges that there were three separate conspiracies, not one; and that proof of facts prior to the date alleged as the start of the conspiracy (August 1, 1966) established a fatal variance between pleading and proof.

Evidence of acts performed prior to an alleged conspiracy, if properly admissible, do not create a fatal variance. Evidence of prior fraudulent transactions are, and were here "properly" admissible, not to prove the conspiracy charged, but to show some other material fact, such as an absence of mistake, motive, opportunity, intent, preparation, plan or knowledge.

The Government charged, and had the burden to prove, that the defendant conspired to, and did devise, a scheme or artifice (a) to defraud, or (b) to obtain money by means of false or fraudulent pretenses, representations or promises. (18 U.S.C. § 1341.)

The crux of the conspiracy charged was to keep the "non-sufficient funds" checks in float between a Hollywood Bank and a Chicago Bank. Temple did this through the active aid of Jones and Augustyn in Los Angeles, and Erickson in Minneapolis. Each of the defendants performed a different role, and may have had dissimilar motives for participating in the transactions, but this does not mean that a single conspiracy did not exist. *United States v. Hoffa*, 367 F.2d 698, 706, *et seq.*

Each participant in the conspiracy need not know what other participants are doing, or why. *Wood v. United States*, 283 F.2d 4 (5th Cir. 1960). The elements of conspiracy may be proved by circumstantial evidence alone. *Jordan v. United States*, 370 F.2d 126 (10 Cir. 1966), *cert. denied*, 386 U.S. 1033. Once a conspiracy is proved, "slight evidence is all that is required to connect a defendant with the conspiracy." *Diaz-Rosendo v. United States*, 357 F.2d 124 (9th Cir. 1966), *cert. denied*, 385 U.S. 856, citing *Sabari v. United States*, 333 F.2d 1019 (9th Cir. 1964); *rehearing denied*, July 9 1964.

It seems clear to us that the proof in this case was sufficient for the jury to find that a single conspiracy did exist, and that defendant Jones was a knowing participant of it.

2. *Evidence of Prior Acts*

(Appellant's Argument "J")

If the purpose of the government offer of testimony of acts prior to August 1, 1966 was to suggest the fraud oriented propensities of the appellant, then, says appellant (Brief, 70), "the error was most prejudicial." He cites *Sang Soon Sur v. United States*, 167 F.2d 431 (9th Cir. 1948). This court there said:

> "The admission of the evidence of independent crimes was error. Its admission cannot be justified under any of the exceptions to the general rule. We fail to see any relevancy between an *evasion of the payment of income taxes* and a conviction for the possession of opium." *Id.* p. 432. (Emphasis added.)

We agree with the statement of the general rule, *i.e.*, some relevancy must exist between the prior act and the act charged. In *United States v. LeVison*, 418 F.2d 624 (9th Cir. 1969), we said, quoting *United States v. Jimenez-Robles*, 415 F.2d 308 (9th Cir. 1969):

> "Granted, the *general* rule is, as appellant asserts, that evidence of prior criminal conduct is inadmissible. However, one well established exception to this rule is that such prior criminal conduct can be introduced to show state of mind or intent, design, knowledge or lack of innocent purpose. *Craft v. United States*, 403 F.2d 360 (9th Cir. 1968); *Metheany v. United States*, 390 F.2d 559 (9th Cir. 1968); *Asher v. United States*, 394 F.2d 424 (9th Cir. 1968)."

The evidence here introduced of acts prior to August 1, 1966, which appellant claims constituted error was evidence establishing that:

> "(1) The Roberts' loan in February, 1966 was a fraud on Hollywood Bank [R.T. 576-581, 869, 879, 2015, 2040-41, 2032-33];
>
> "(2) In February, 1966, Temple cashed worthless Cal-I Exploration checks at Hollywood Bank [R.T. 514-17; 520-26];
>
> "(3) In March, 1966, he (Jones) had been advised that Temple was a 'confidence man' (Sgt. Carpenter's testimony [R.T. 1225-28]); and

"(4) That Jones told Temple about Hollywood Bank's banking procedures so that Temple would know how to float the non-sufficient fund checks between Hollywood Bank and Chicago Bank [R.T. 520-25]." (Appellee's Brf., p. 54.)

We hold such evidence could be properly introduced to show intent, plan, and knowledge. 2 Wigmore, Evidence 3d ed. §§ 300-373; Uniform Rules of Evidence, Rule 55.

We also think these prior transactions were admissible to refute Jones' testimony that he never knew of Temple's check kiting operations prior to January 10, 1967. (R.T. 1706-1708.)

3. *Misconduct of the Trial Judge*

This alleged error is based in six separate instances of judicial actions:

(a) Misstatement of evidence. (Appellant's Argument "E")

(b) Comments constituting partial direction of verdict. (Appellant's Argument "C")

(c) Advising the jury the codefendants had plead guilty. (Appelant's Argument "F")

(d) Questioning of witnesses so as to prejudice appellant. (Appellant's Argument "O")

(e) Reference to a confession not in evidence. (Appellant's Argument "P")

(f) Failure to advise defense counsel in advance the judge would comment on the evidence. (Appellant's Argument "Q")

3(a). Appellant's first argument is that the trial court in commenting on the evidence *"confused"* Exhibit 93 (10 days of "account analysis reports") with Exhibit N ("potential overdraft list") stating that appellant "had stated he had seen all that," referring to Ex. 93. Appellant argues that appellant had never testified he saw the "account analysis reports" *on a regular basis;* but that he *made it a practice* to examine Ex. N, the "potential overdraft list."[1]

[1]It is of interest that appellant urges, not that Jones testified he never saw the "account analysis reports," (Ex. 93) but that he never saw them *"on a regular basis,"* and that he "had only made it a practice to

Appellant draws too absolute a line between the contents of Ex. N and Ex. 93. Jones did recall seeing Ex. N. It was a record of all checks presented on a given day that might create an overdraft (R.T. 1541). Every day Jones would review the sheets reflecting the potential return items (R.T. 1775). All checks listed in Ex. N would be attached to it (R.T. 971-972). Jones testified he saw *potential overdrafts for the Nickward account* when he reviewed Ex. N (R.T. 1834-35; 1841). Ex. N reflected numerous overdrafts during the month of October, 1966 (R.T. 1839-1875). "It was conceded that these documents [Ex. N] were checked by Appellant each morning." (Opening Brief, p. 48.)

The fact that more detailed and complete information was given each morning on the "account analysis report," (Ex. 93), than that revealed by Ex. N, but that appellant did not always see it, does not mean the judge was confused between Exhibits 93 and N.

3(b). We must consider the comments made by the judge in relation to the facts of this case. It was a long and complicated trial. It was peculiarly a case where a judge might properly comment on the evidence, without arguing its merits, provided he gave the required admonitions to the jury clearly showing them they were not bound by his comments.

> "A federal trial judge is more than a moderator or umpire. He has the responsibility to preside in such a way as to promote a fair and expeditious development of the facts unencumbered by irrelevancy. He may assist the jury by commenting upon the evidence, and this way include an appraisal of the credibility of witnesses, provided the comment is fair and the jury is clearly instructed that they are to find the facts and may disregard such comments." *Smith v. United States*, 305 F.2d 197, 205 (9th Cir. 1962), *cert. denied*, 371 U.S. 890 (1962); *Young v. United States*, 358 F.2d 429, 430 (9th Cir. 1966).

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examine Ex. N"; that the sheets comprising Ex. 93 were "not used much" in the bank, and that there "was very little reference to those sheets by anyone in the bank." None of this proves, of course, that appellant Jones *never* saw them.

That the trial court fully complied with his obligations in instructing the jury is clear. (R.T. 2569-2573.)

We conclude the comments made by the court on the evidence showed neither confusion, nor any unfairness, nor were they "a partial direction" of the verdict.

3(c). (Appellant's Argument "F"): It is also urged the trial judge erred in advising the jury that codefendants Erickson, Augustyn and Temple had entered pleas of guilty.

When the trial commenced on January 16, 1968, and before the jury was empaneled, defendant Erickson requested leave to withdraw his plea of not guilty to one count, and to plead guilty thereto. This was permitted. The court then empaneled a jury, an opening statement was made by the Government and the trial was then continued one week. At that time (January 23, 1968), the defendant Augustyn moved to withdraw his not guilty plea, and to plead guilty to one count. The motion was granted, and the defendant Temple then moved to change his plea to two counts, and that motion was granted.

> The jury was then instructed by the trial judge: "[T]he reason we are not trying Mr. Augustyn is because he pleaded guilty to one count, the reason we are not trying Mr. Erickson is because he pleaded guilty to one count; and the reason Mr. Temple is not on trial now is because yesterday he pleaded guilty to two counts. So the case will proceed as to Mr. Jones only." (R.T. 57.)

No objection was lodged to this statement. In fact, there was no reason to make any objection. Such a plain and nonargumentative statement is proper. *Davenport v. United States,* 260 F.2d 591, 595-6 (9th Cir. 1958). *Cf.* also *Aronson v. United States,* 319 F.2d 48 (2d Cir. 1964), *cert. denied,* 375 U.S. 920, *rehearing denied,* 375 U.S. 982; *Woods v. United States,* 279 F.2d 359 (8th Cir. 1960).

The case relied upon by appellant which allegedly disclosed "a similar situation" is *Edwards v. United States,* 286 F.2d 681 (5th Cir. 1960). The situation there was not similar. In *Edwards,* the trial judge relied on "common knowledge," and "what was in the newspapers," and made an incorrect statement to the

jury as to the plea of one of three defendants. One of the defendants (Evans), charged as an aider and abettor, had admitted certain facts but denied he had any criminal intent. One defendant (Hall) had been charged as a principal and convicted in a non-jury trial. The third defendant, Edwards, was convicted by a jury, but the trial judge referred to codefendant Evans as having "admitted his guilt and entered a plea of guilty." he had done neither (p. 683). Thus, said the Fifth Circuit, the guilt of Evans was taken from the jury.[2]

Here the trial judge had himself accepted the change of plea from each of the three codefendants, in and during the trial of this case. No error was made by Judge Hall in the recitals respecting pleas, as was made in the Edwards' case.

If no explanation is made to a jury of why certain defendants, originally in a criminal case, are no longer participants at the trial, the jury is full of curiosity, conjecture and surmise. Most experienced trial judges think the best, safest and fairest procedure to all is a simple and honest statement to the jury as to why codefendants are no longer such. Such a statement was made herein, and under the circumstances of this case was not error.

3(d). Undue interference by questioning witnesses. It is urged as error that the trial judge unduly interfered with the trial of this case. No cases are cited in support of this charge. We find no merit in this alleged error. *Spindler v. United States,* 336 F.2d 678, 682 (9th Cir. 1964).

3(e). The court's statement that inasmuch as "there have been no admissions against interest in this case put on, or any confessions, so I will skip that portion". (R.T. 2541) was made during his instructions to the jury. Counsel for appellant conjures up the claim the positive statement "there have been no admissions or confessions" as an intimation that there had been an admission or confession. This claim of error is frivolous and approaches the ridiculous. We find no error.

3(f). Appellant's trial counsel was not present while certain instructions were given the jury, nor during certain comment on the evidence by the court. Associate counsel was present

[2] *Cf.* also *Hall v. United States,* 286 F.2d 676 (5th Cir. 1960).

representing appellant, but no objection was made, either to such instructions or comment. Now appellant urges the court should have advised appellant's trial counsel what it proposed to say at the later date when trial counsel proposed to absent himself. Such an argument attempts to transfer the responsibility from counsel to the court, and make the latter clairvoyant. The claim is entirely without merit.

4. We next consider the charge of misconduct on the part of the prosecutrix, in that she allegedly (a) suppressed evidence; (b) failed to comply with the court's orders (Appellant's Argument "G"); and (c) made reference to acts of codefendants Temple, Erickson and Augustyn in her opening remarks to the jury (Appellant's Argument "N").

Again, the last point ((c) above) urged is frivolous and approaches the ridiculous. The opening statement was made by the prosecutrix *before* Temple entered his plea of guilty. Appellant *assumes* the prosecutrix knew that Temple would later change his mind as to his plea. No proof was offered as to this, and no factual support for any charge of misconduct appears in the record before us. No mistrial was asked for by Jones' counsel, either when the opening statement was made, or when the change of plea was made, and no case is cited to support the claim of error.

4(a), above. The alleged suppression of evidence relates to impeaching testimony (Exs. 85-90). The Exhibits were marked for identification in the cross-examination of Jones (R.T. 2121). The trial court held they were impeaching documents, and did not fall within the court's discovery order (4(b) above) (R.T. 2148). They were used to impeach Jones' denial that he had never received any money from Temple. Temple had testified he gave $6,000 to one Long to give to Jones.

This is a matter clearly falling within the discretion of the trial judge in admitting impeaching testimony. *Meyer v. United States*, 396 F.2d 279, 283 (8th Cir. 1968). A preliminary and pre-trial disclosure of documents (which may or may not be originally in the hands of the prosecution and which may or may not be offered in rebuttal or impeachment to a defendant's testimony), need not ordinarily be produced *prior* to trial—the reason being there is no pre-trial method of establishing their relevancy.

As the Government states, defendant asserts he has an absolute right to all documents prior to trial under the doctrine of *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and *United States v. Consolidated Laundries Corporation*, 291 F.2d 563 (2d Cir. 1961). These cases do not support defendant's theory. The concept of *Brady v. Maryland, supra*, is that the prosecution must disclose evidence that is *favorable* to the accused. *Id.* at 87. In *Consolidated Laundries, supra*, at 569-570 the court relied upon the fact that the missing documents would have been helpful to the accused in cross-examining plaintiff's witness. Defendant has not, and cannot make any showing that Exhibits 85-90 constitute evidence that would be favorable to Jones.

This is the evidence that the prosecutrix is charged with suppressing. There was no suppression. We find no merit in the charges of misconduct by the prosecution.

5. We next consider the errors charged as to instructions (Appellant's Arguments "A", "B", "D" and "K"), which are: (a) The failure to instruct that an accomplice's testimony must be viewed with caution; (b) the failure to instruct that the principal, Temple, must be found guilty of the substantive offenses before appellant can be found guilty as an aider and abettor; (c) the failure to instruct the jury that guilty knowledge that a crime was being committed is insufficient proof appellant aided and betted the crime; and (d) the failure to instruct the jury to return a special verdict.

5(a). There is no question but that the "view with caution" instruction is usually given in a case of this kind. Mathes & Devitt, Federal Jury Practice and Instruction § 904.

It is true that some courts have held that it is reversible error not to give such an instruction even *when not requested*, when the evidence was weak—*Williamson v. United States*, 332 F.2d 123 (5th Cir. 1964); or, *when it is requested*, is correct, is not covered elsewhere, and is on such a vital point that failure to give it deprived defendant of a defense and seriously impaired its effective presentation, *Phelps v. United States*, 252 F.2d 49 (5th Cir. 1958); or, *when requested* as to an informer's testimony, *Fletcher v. United States*, 158 F.2d 321 (D.C. Cir. 1946). It is also true that two circuits have found that a failure to so instruct is plain error, regardless of whether it has been requested under exceptional circumstances. *Williamson v. United*

States, supra; McMillen v. United States, 386 F.2d 29 (1st Cir. 1967). It is likewise undisputed that here no such an instruction was requested by defendant's counsel—and that after all instructions were given no objection was raised by the defendant's counsel to the instructions as given. (R.T. 2574.) It is also undisputed that in this circuit, the uncorroborated testimony of an accomplice is sufficient to sustain a conviction, *Williams v. United States,* 308 F.2d 664 (9th Cir. 1962), and that the testimony of one witness, if believed, is sufficient to prove a fact. *Proffit v. United States,* 316 F.2d 705 (9th Cir. 1963).

The majority of circuits, including our own, have not yet held that the failure to instruct that the testimony of an accomplice is to be viewed with caution is, per se, plain error.

As in so many other areas, we believe a case by case approach is required. While the frequently used Mathes & Devitt 9.04 Instruction was not given, the jury was not left totally without aid. It was instructed as appears in the margin.[3]

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[3]"In this case witness Edward Temple admitted on the witness stand that he had been convicted of and had served terms in the penitentiary for several felonies.

"This evidence is to be considered by you only insofar as it affects the credibility of that witness and must not be considered as evidence of guilt or innocence of the defendant who is on trial.

"Edward Temple pleaded guilty to two counts of the indictment.

"In judging the credibility of the witnesses in this case, you may believe the whole or any part of the evidence of any witness, or may disbelieve the whole or any part of it, as may be dictated by your judgment as reasonable men and women.

"You should carefully scrutinize the testimony given, and in so doing consider all of the circumstances under which any witness has testified, the witness's demeanor and manner while on the stand, the witness's intelligence, his or her relation to the Government or to the defendant or to any of the parties in this case, and the manner in which he or she might be affected by the verdict and the extent of contradiction or corroboration or other evidence, if any, and every matter that tends reasonably in the light of your own experience as reasonable men and women to shed light on the truth and credibility of the witness and their testimony." (R.T. 2540-41.)

"I need not review the evidence as was done by the prosecutor here in detail, but let us disregard the testimony of Temple, let's assume that Edward Temple here is not worthy of truth, you must determine whether or not the things that he did testify to are corroborated by other circumstances and incidents that can't be changed, such as a person's testimony can." (R.T. 2570; Appellee's Brief, pp. 37-39.)

The suggestion that the jury should pass on the evidence before them—"disregard[ing] the testimony of Temple, let's assume that Edward Temple here is not worthy of [belief as to] his truth; you must determine whether or not the things that he did testify to are corroborated by other circumstances and incidents that can't be changed, such as a person's [testimony] can." (R.T. 2570.)

We agree with the Government that while the instruction did not characterize Temple with the shibboleth word "accomplice," it did, forcefully, direct the jury to closely and carefully scrutinize his testimony, because of his own close connection with the case.

In essence, then, we think it fair to state the jury was instructed to weigh Temple's testimony with great care.

In addition to the fact that a closely similar instruction was given, we hold that other evidence here introduced did corroborate the testimony of Temple.[4] We have repeatedly held that under such circumstances, the failure of the court, sua sponte, to give the accomplice testimony instruction is not error. *Mims v. United States*, 254 F.2d 654 (9th Cir. 1958); *Young v. United States*, 297 F.2d 593 (9th Cir. 1962); *Sartain v. United States*, 303 F.2d 859 (9th Cir. 1962); *Strangway v. United States*, 312 F.2d 283 (9th Cir. 1963), *cert. denied*, 313 U.S. 903; *Dawkins v. United States*, 324 F.2d 521 (9th Cir. 1963); *Brothers v. United States*, 328 F.2d 151 (9th Cir. 1964); *Hankins v. United States*, 384 F.2d 713 (9th Cir. 1967); *Barnes v. United States*, 383 F.2d 542 (8th Cir. 1965); *DeWitt v. United States*, 383 F.2d 542 (5th Cir. 1967); *McMillen v. United States, supra; United States v. Kelly*, 349 F.2d 720, 767 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966).

5(b). As to the aider and abettor instructions, we assume appellant's argument is limited to Counts Two to Six, and not to the conspiracy alleged in Count One.

The jury was instructed as to what constitutes aiding and abetting (R.T. 2568, lines 6-25; R.T. 2569, lines 1-9). There is

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[4]Witness Hoffman (R.T. 1153-1165). Exs. 35, 48, 49, 49c, 86. Witness Murphy (R.T. 905-916). Testimony of Jones himself (R.T. 2116, 2122, 2178).

no question but there must be a guilty principal before there can be an aider or abettor. *Edwards v. United States*, 286 F.2d 681 (5th Cir. 1960). We are satisfied the instructions given sufficiently state that someone must have committed the crime charged, and that there must be proof the defendant aided and abetted its commission: "he associated himself with the venture." *Nye and Nissen v. United States*, 336 U.S. 613, 619 (1949). We are influenced here by the fact no objection was made to these instructions, and no better instruction offered by defendant's counsel.

5(c). The same observations apply to appellant's argument that guilty knowledge alone is insufficient to convict. We agree, with that principle, but the instructions given in this case required more than knowledge that a crime was being committed—they required active *participation* by Jones, not in every act of Temple, Erickson and Augustyn, but in the total scheme to defraud. We find no error.

5(d). With respect to the lack of special verdicts, we point out, as appellant concedes, it has long been the law that "it is not the practice of the Federal Courts in criminal cases to call for special verdicts." *Anderson v. United States*, 273 Fed. 677, 679 (9th Cir. 1921), citing 130 U.S. 100.

Special verdicts are sometimes necessary in cases such as treason cases. *Cramer v. United States*, 325 U.S. 1 (1945); *Haupt v. United States*, 330 U.S. 631 (1947); *United States v. Kawakita*, 190 F.2d 506 (9th Cir. 1951). While clearly the use of special verdicts frequently aids an appellate court in determining the jury's thinking, *Beek v. United States*, 298 F.2d 622, 630, 631 (9th Cir. 1962), the least that can be expected from competent counsel is to have them ask for such an aid at the trial court level. *Lofland v. United States*, 357 F.2d 472 (9th Cir. 1966), *cert. denied*, 385 U.S. 1026; *Bisno v. United States*, 299 F.2d 711 (9th Cir. 1961).

Here no special verdict was requested by appellant's counsel. While we may question if such a request should have been or would have been granted, had it been made, the fact is it was not, and any error was thus waived.

Nor can we agree the failure to ask for a special verdict resulted in any prejudice to appellant. The jury was correctly instructed

on what constitutes the essential elements of the crime of mail fraud (R.T. 2564-65), and it was instructed that its verdict must be unanimous (R.T. 2573). With this in mind, the jury returned a verdict of guilty on the five counts (Counts Two through Six) charging substantive violations of the mail fraud statute.

The law presumes that the jury follows the instructions of the court. *Myers v. United States*, 390 F.2d 793 (9th Cir. 1968); *Winchester v. United States*, 394 F.2d 489 (9th Cir. 1968). Accordingly, the verdict on Counts Two through Six must be interpreted as meaning that the jury unanimously believed that the mail fraud scheme alleged in Counts Two through Six existed. Therefore, since Count One charged that one of the objects of the conspiracy was to commit the mail fraud scheme alleged in Counts Two through Six, it thus becomes obvious that the verdict on Count One was predicated, at least in part, on a unanimous decision that Jones and his coconspirators conspired to violate the mail fraud statute.

6. This brings us to Appellant's Argument "H"—the insufficiency of the evidence as a matter of law (a) with respect to a violation of the mail fraud statute (18 U.S.C. § 1341), because the mails were used *after* the fraudulent scheme was completed, and (b) because there was no proof of intent to defraud.

6(a). With respect to the chronological timing of the checks, appellant largely relies on *Kann v. United States*, 323 U.S. 88 (1949). While certain language in that case supports appellant's position, a careful reading of it indicates its rule has application only to a single act of cashing a worthless check, and not to a continuing check kiting scheme to defraud, as was here found.

The same point was raised before this court in *Suhl v. United States*, 390 F.2d 547, 552, 553 (9th Cir. 1968), wherein this court stated:

> "Reliance on Kann is misplaced. That case involved fraudulent diversion of corporate funds, the scheme being complete when the corporation's checks were cashed. The bank's later use of the mails to collect the checks was irrelevant to the scheme and was thus held to be an insufficient basis upon which to base a mail fraud conviction. The Court specifically distinguished cases where use of the mails is an integral part of the scheme. 323 U.S. at 94-95. *In the present case, an*

> *essential part of the charged transaction was the delay incident to the necessity of mailing the Gibson checks to Covelo. This delay enabled Suhl to deal in Royal Properties stock with non-existent funds.*" (Emphasis added.)

Cf. also, *Pereira v. United States*, 347 U.S. 1 (1954), and *United States v. Kelem*, 416 F.2d 346 (9th Cir. 1969).

The Court itself in *Kann, supra*, had qualified its general language by this statement:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States v. Kenofskey*, 243 U.S. 440. *Also to be distinguished are cases where the use of the mails is a means of concealment so that further frauds which are part of the scheme may be perpretrated.*" *Id.* at 94-95. (Emphasis added, citing cases in n. 9.)

6(b). We find no merit in the position that there was no proof of intent to defraud. While such an intent is an essential element in a mail fraud case, it was charged in the indictment, instructed on by the court, and found by the jury. The jury could have found the appellant Jones acted with gross negligence, as his counsel urges, but without any intent to defraud. The jury did not so find, and we cannot disturb its finding. Of course, intent can be found from circumstantial evidence, *Phillips v. United States*, 356 F.2d 297 (9th Cir. 1955), and need not be specifically admitted or confessed.

7. We need not specifically answer appellant's Arguments "L" and "M", other than to state:

(1) We are thoroughly familiar with the dangers and perils to defendants in conspiracy cases, and the use of the theory of a conspiracy in many criminal prosecutions. But we know of no cases forbidding the use by United States Attorneys of any United States statutes creating crimes. The remedy, if any is required, lies with the legislative branch of our Government, not the judicial. *Amsler v. United States*, 381 F.2d 37 (9th Cir. 1967).

(2) As to overt acts alleged between defendant Jones and one Gregory, a nondefendant, the Government asserts the telephone conversation named in overt act number four, Count One, while

from Gregory *to* Jones, was still an overt act in furtherance of the conspiracy because its topic was certain "nonsufficient fund checks" that Temple had cashed as part of the check kiting scheme alleged in the indictment. We agree it could be. *Cf. Bartoli v. United States*, 192 F.2d 130 (4th Cir. 1951).

It is clear as long as the disposition of the case against a coconspirator does not remove the basis for the charge of conspiracy, a single defendant can be convicted of the offense based upon proof of overt acts committed by the coconspirator not tried or not convicted. *Braverman v. United States*, 317 U.S. 49 (1942); *Ng Pui Yu v. United States*, 352 F.2d 626 (9th Cir. 1965); *United States v. Shipp*, 359 F.2d 185 (6th Cir. 1966), *cert. denied*, 385 U.S. 903; *Nasif v. United States*, 370 F.2d 147 (8th Cir. 1962).

Finding no error, the conviction is AFFIRMED.

Judgment and Commitment (Rev. 7-52) Cr. Form No. 25

United States District Court

FOR THE

CENTRAL DISTRICT OF CALIFORNIA

United States of America

v.

J. NORMAN JONES

No. 657 - Criminal

On this 25th day of March, 1968 came the attorney for the government and the defendant appeared in person and[1] by counsel Karl Ransom - Retained

IT IS ADJUDGED that the defendant has been convicted upon his plea of[2] not guilty to counts 1 thru 6 and a verdict of guilty of counts 1 thru 6 of the Indictment of the offense of Conspiracy; Mail Fraud; Aiding and Abetting, in violation Title 18, United States Code, Sections 371 1341 and 2.

as charged[3] in counts 1 thru 6 of the Indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for ~~a period of~~ a maximum period of 5 years and a minimum of 18 months under the provisions of Title 18, United States Code Section 4208(a)(1) on Count 1 of the Indictment and a maximum period of 5 years and a minimum period of 18 months as to each of the counts 2 thru 6 under the provisions of Title 18, United States Code Section 4208(a)(1) to be concurrent with and not consecutive to each other and the sentence on count 1.

~~IT IS ADJUDGED THAT~~

IT IS FURTHER ORDERED that the defendant's bond is exonerated and the defendant is to stand committed.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

PEIRSON M. HALL *United States District Judge*

~~The Court recommends commitment to~~

FILED: March 25, 1968

WM. A. CHILDRESS, Clerk

By Joseph A. Montague Deputy Clerk

EXHIBIT "B"

91